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IN THE

SUPREME COURT OF THE STATE OF COLORADO.

~~No. 4215.~~

SAMUEL McMILLEN, RONALD MORRISON, AND EBEN SMITH, APPELLANTS,

vs.

THE FERRUM MINING COMPANY, A CORPORATION, ETC., APPELLEE.

APPEAL FROM THE DISTRICT COURT OF LAKE COUNTY.

BRIEF AND ARGUMENT OF APPELLANTS.

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STATEMENT OF THE CASE.

This was an ejectment suit brought by appellants, plaintiffs below, upon the 20th of November, 1897, as the owners of the Eulalia Lode mining claim, in support of an adverse claim filed in the United States land office at Leadville against the application for patent by the appellee, defendant below, for the Golden Rod Lode mining claim.

The Eulalia Lode mining claim was located upon May 30, 1893, in the name of John Kennedy, by Samuel McMillen and John McCombe, and consisted of three fractional parts of a full mining claim, separated one from the other by a

space of 300 and 400 feet, said tracts being designated in the adverse as Tract A, area one hundred and sixty-five thousandths of an acre (0.165 A.); Tract B, area one acre and seventy-four thousandths of an acre (1.074 A.), and Tract C, area two acres and one thousandth of an acre (2.001 A.). (See plate at page 44 of Abstract.)

The ground embraced in the Eulalia Lode mining claim was the abandoned and forfeited territory inclosed within the lines of the Winter lode, United States survey No. 427, and the surveyed lines of the said Eulalia lode were identical with the lines of the Winter lode, as approved by the surveyor general of Colorado, in its application for patent June 25, 1879.

The ground inclosed within the Winter lode had also been included within the lines of numerous former locations for thirteen and fourteen years prior to the 30th of May, 1893, most of such locations being prior to 1880. The names of some of these claims were the Pocket Liner lode, the Robert Burns lode, the Glengary lode, the Pennsylvania lode, the Eclip lode, the Little Winnie lode, the Comstock lode, the Lowland Chief lode, the Highland Chief lode, the Carlton lode, the Badger Girl lode, and the Howland lode. It is undisputed that the ground embraced in the Eulalia location had been, long previous to May 30, 1893, located and worked as mining ground, and so held by other parties as well as the Winter and Pocket Liner owners. These facts were publicly known at the time the Eulalia lode was located.

Upon the 25th of January, A. D. 1894, Robert B. Estey and Charles T. Limberg, grantors of appellee, entered upon the same identical premises and located their claim, called the Golden Rod claim.

The discovery shafts of the two claims were both located at a point 400 feet west of the east end line of the claims and within a distance of three or four feet of one another. Neither shaft was sunk to exceed a depth of twelve or four-

teen feet, and neither the appellants, plaintiffs below, nor the appellee, defendant below, made claim and introduced evidence in the case that mineral in place had been discovered in either one of said discovery shafts, and the admitted fact was that neither shaft had passed through or below the wash and alluvial debris usually encountered upon Breece hill.

The undisputed evidence was that the discovery notices for both the Eulalia lode, appellants' claim, and the Golden Rod lode, appellee's claim, were posted at these two twelve-foot holes designated by them as their original discovery shafts, and that no other or different notices were ever placed at any other point upon the surface of these two contested claims by either the appellants or appellee, or their grantors.

Appellants' title to the Eulalia lode was based upon the following positions:

1. That upon the 30th of May, A. D. 1893, Samuel McMillen, one of the locators and owners of the Eulalia Lode mining claim and one of the appellants herein, plaintiffs below, had, prior to that date, discovered within the limits of his said location, the Eulalia lode, a vein and lode of mineral, bearing gold and silver, and knew at the time of making his location upon the said 30th of May, A. D. 1893, that there had been a discovery of a vein or lode within the limits of his location; that this vein and lode then existed and was disclosed in what has been termed in this suit the Pocket Liner shaft, a shaft sunk by Samuel McMillen and his co-owners of the Pocket Liner lode, in the years 1879 and 1880, to a depth of 125 or 130 feet; that at a point 75 or 80 feet from the surface a vein and lode of gold and silver bearing ore was disclosed and opened by the said Samuel McMillen and his co-owners, which was over a foot thick, with distinct walls, having a course 61 degrees east and dipping 69 degrees to the west, passing out of said shaft

at a point about 120 feet from the surface; that the said Pocket Liner shaft was situated some 750 or 800 feet west of the point on the surface of the Eulalia lode where the discovery stake and notice of discovery were placed by the said Samuel McMillen and his co-locators of the Eulalia lode upon the 30th day of May, 1893, and that said Pocket Liner shaft and the vein disclosed and discovered therein was, were, and are within the lines and limits of the Eulalia lode, and that said discovery was claimed by the said McMillen as his discovery of the Eulalia lode; that the title of the Pocket Liner lode had lapsed and become forfeited for failure to do the annual labor by the owners thereof, and that on the 30th day of May, 1893, the territory contained within the lines and limits of the said Eulalia lode was unappropriated and vacant mineral land of the United States.

2. That during the summer and fall of the year 1894 the appellants Ronald Morrison and Samuel McMillen and their then co-owner, John McCombe, opened, disclosed, and discovered by drifts, upraises, and stopes from the 380-foot level of the Little Vinnie Lode mining claim, a lode claim adjoining the Eulalia Lode mining claim upon the east, a vein, lode, and ledge of gold and silver bearing ore within the limits of the Eulalia Lode mining claim, and shipped therefrom large quantities of valuable gold and silver bearing ores; that said mineral and ores were taken from a vein, lode, and ledge of mineral in rock in place within the limits of the Eulalia Lode mining claim, and at a point over ten feet below the surface of said claim, viz., being three hundred and eighty (380) feet from the surface of the earth, ore shipped from the said vein or lode containing five and four-tenths (5.4 oz.) ounces silver and one (1 oz.) ounce gold per ton, gross value twenty-two and six-hundredths ($22.06) dollars per ton.

3. That during the summer and fall of the year 1895, while in the performance of the annual labor upon the Eulalia Lode mining claim, these appellants, Samuel McMillen, Ronald Morrison, and Eben Smith, drove a drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface, not less than ten feet in length, and that said drift was driven upon a vein, lode, and ledge of mineral.bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the date he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

4. That during the fall of the year 1898, while in the performance of the annual labor upon the Eulalia Lode mining claim, these appellants, Samuel McMillen, Ronald Morrison, and Eben Smith, continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface, a distance of over ten feet, upon a vein, lode, and ledge of mineral bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the day he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

5. That during the fall of the year 1899, while in the performance of the annual labor upon the Eulalia Lode mining claim, these appellants, Samuel McMillen, Ronald Morrison, and Eben Smith, continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from

the surface to a distance of 39 feet from the shaft, upon a vein, lode, and ledge of mineral bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the day he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

Appellee's title to the Golden Rod lode was based upon the following positions:

1. That upon the 25th day of January, A. D. 1894, Charles T. Limberg and Robert B. Estey entered upon the premises in dispute and sunk a discovery shaft to a depth of ten or eleven feet, within four feet of the discovery shaft of the Eulalia lode, calling their claim the Golden Rod lode and placing their discovery notice at that point; that upon the 30th of January, 1894, the said Limberg and Estey leased to Messrs. Charles Slavin and Thomas Walsh, then in possession of the shaft known as the Pocket Liner shaft, their Golden Rod lode; that the lessees, during the year 1894, drove a drift in a southeasterly direction from the said Pocket Liner shaft at a depth of 130 feet from the surface, the drift being 45 feet in length, and opened and disclosed therein six veins, lodes, and ledges of mineral bearing gold and silver in rock in place, their positions and descriptions being as follows:

A. Designated as vein No. 1, four feet from the southeast edge of the shaft, running north 30 degrees east, magnetic dipping 70 degrees west, with both walls porphyry, an inch to an inch and one-half wide, sample assaying 0.5 ounces silver and 0.02 ounces gold.

B. A vein six feet from the edge of the shaft, material assaying 7 ounces silver, .03 ounces gold.

C. A vein fifteen or sixteen feet from the shaft running north, with both walls porphyry, from one-fourth (¼) of an inch to one-half (½) of an inch thick.

D. Designated as vein No. 2, nineteen feet from the edge of the shaft, running northwest and southeast, dipping north 61 degrees east, both walls porphyry, an inch to an inch and one-half wide, sample assaying 0.5 ounces silver, 0.02 ounces gold.

E. Designated as vein No. 3, forty-one feet from the edge of the shaft, running in a northerly direction, dipping to the west, both walls porphyry, an inch to an inch and one-half thick, sample assaying a trace silver, 0.09 ounces gold.

F. Designated as vein No. 4, forty-five feet from the shaft, running north 10 degrees east, magnetic dipping 48 degrees west, both walls porphyry, one to three inches thick, samples assaying no silver, 0.13 ounces gold, and 0.4 ounces silver and 0.11 ounces gold.

It is hardly necessary to state that the trial court absolutely and positively refused to allow appellants, plaintiffs below, to introduce any evidence whatever to the jury sustaining any one of the five positions claimed as the basis for their title.

In rich and striking contrast to his rulings upon the evidence tending to sustain the appellants' case was the easy and generous manner in which the court permitted the appellee, defendant below, to introduce all the evidence they desired to sustain their claims that six veins existed and were disclosed in a drift but forty-five feet long, run in porphyry, and denied appellants' request to send the jury to inspect the mine, and especially the drift, as provided by section 188 A of the Civil Code, their sole resource after the arbitrary rulings of the court.

The instruction as given at the request of the defendant, as appears upon page 270 of the abstract, folios 73 and 74 of the transcript, was a necessary corollary to the evident and

persistent desire of the court to defeat plaintiffs of their title to the premises.

That instruction was as follows:

"The court further instructs the jury that under the pleadings and evidence introduced in this cause the plaintiff cannot recover, and the sole issue presented to the jury is as to whether the defendant or its grantors have made a valid discovery and location upon the Golden Rod claim and performed the necessary work thereon. If the jury believe from the evidence that a valid discovery and location of a mining claim was made by the owners of the Golden Rod claim, and that $100 worth of work was done thereon during the year 1899, then you will find for the defendant."

The conclusion was of course a verdict by the jury against the appellants, plaintiffs below, and for the appellee, defendant below, and it is the judgment entered upon that verdict in favor of appellee for the ground in controversy which appellants seek to reverse by the prosecution of this appeal.

ARGUMENT.

Appellants were entitled to introduce evidence that at and prior to their location of their Eulalia lode, upon May 30, 1893, there had been a discovery theretofore made of a vein or lode of quartz or other rock in place bearing gold and silver, whether made by themselves or other parties, and that they knew and claimed at the time of making their location that there had been a discovery of a vein or lode within the limits of their location.

This error is included in assignments of error numbers one, thirty-one, and numbers seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-three, the first two referring to the exclusion of testimony and the latter

seven covering the refusal to give to the jury instructions numbers two, three, four, five, six, seven, and eight asked for by plaintiffs.

These assignments of error are as follows:

"First. That the court erred in refusing to allow plaintiffs to prove by Thomas H. Thompson the discovery and existence of a vein of gold and silver bearing ore in rock in place in the Pocket Liner shaft within the limits of the Eulalia Lode mining claim prior to the location, staking and survey of the Eulalia Lode claim; and that Samuel McMillen, one of the appellants and plaintiffs below, was one of the owners of the Pocket Liner Lode claim at the time of such discovery and disclosure of said vein, and knew and claimed at the time of the location and staking of the Eulalia Lode claim of the discovery and existence of a vein of gold and silver bearing ore in the Pocket Liner shaft within the limits of his location, the Eulalia Lode mining claim" (page 275, Abstract).

"Thirty-one. The court erred in not allowing Thomas H. Thompson, witness for plaintiffs, to answer the following question:

"'Q. Will you state what you found in that shaft in the year 1879?'" (page 289, Abstract).

The full evidence of Thomas H. Thompson, as far as permitted by the court, and the rulings of the court in refusing to allow further testimony, is contained upon pages 64, 65, and 66 of the Abstract, and is as follows:

"Thomas H. Thompson—Was born in Ireland; my parents were born at Inverness, Scotland; have been in this country about thirty-five years; have been in Colorado about twenty-nine years or twenty-eight years; my occupation in life has been principally mining; am acquainted with the section of the country known as Breece hill; mined first in this State at the Hardscrabble mining district, in Fremont county, in 1872; after that in Rosita, and after that at Francis coal bank at Francisville, near Colorado Springs; then in Leadville; since then in Cripple Creek and in Bonanza; also in Park county, at the Russia mine. I was in California gulch in 1872, in the spring of 1872, and in the fall I went to the Hardscrabble mining district. Yes, sir I located the Pocket Liner claim; the locators and first owners

of the property were Frank McGuire, Terrance Connors, Charles Slavin and myself. There were supposed to be two silent partners in the claim; they were James Joyce and Sam McMillen.

"Q. Will you go on and state who did the location work of the Pocket Liner claim?

"Objected to by defendant as incompetent, immaterial and not tending to establish any issue in this case.

"The COURT: State the purpose.

"Mr. ELDER: The details of locating the claim.

"The COURT: Is that the only claim interested?

"Mr. ELDER: That is the original claim within the lines of which this discovery was made.

"The COURT: I sustain the objection unless Mr. Elder has a further and better reason. I don't see the materiality of any evidence with regard to the Pocket Liner claim; that is not in issue in this case. If you can show me the materiality of it I shall be glad to have you do so.

"A. I was at that time familiar with the lines of the Glengary Lode claim. I had a half interest in the Glengary claim and located the Pocket Liner at the side line of the Glengary at the north side line.

"Q. Will you state what you found in that shaft in the year 1879?

"Objected to by defendant as incompetent, immaterial and not tending to prove any issue in the case.

"The COURT: Let us hear from you, Mr. Elder, why you want to show what was in that shaft.

"The jury were thereupon excused for thirty minutes.

"Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with his co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other

things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc., etc.

"The COURT: I cannot agree with you. Our statute is clear as to what is required, and it has become almost elementary. You must go either upon the vein and make your discovery or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted."

The assignments of error numbers seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-three were upon instructions based upon the facts to be proved by testimony of such vein and lode excluded in the above ruling and were as follows:

"17. The court erred in refusing to instruct the jury, on request of plaintiffs' instruction No. 2, as follows:

"The court further instructs the jury that, although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one" (page 280, Abstract).

"18. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 3, as follows:

"The court instructs the jury that the essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral-bearing rock in place, and if the relocator finds such vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid relocation thereon; though such finding is not a disclosure of something that 'existed before, but remained unknown,' and therefore technically, perhaps, does not constitute a discovery" (page 281, Abstract).

"19. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 4, as follows:

"The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon

the ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made, of the existence of mineral. And under section 2320 Revised Statutes of the United States, the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator" (pages 281 and 282, Abstract).

"20. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 5, as follows:

"The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location.

"It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, but it must be known to him, and claimed by him, in order to give validity to the location" (page 282, Abstract).

"21. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 6, as follows:

"The jury are instructed that the following provisions of the statutes of Colorado must be substantially complied with in the relocation, either in part or in whole, of abandoned lode claims.

"The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property" (pages 282, 283, Abstract).

"22. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 7, as follows:

"You are further instructed by the court that only the un-

occupied and unappropriated mineral lands of the public domain are subject to exploration and location. When one has discovered a vein and has fully complied with the law in locating and recording a claim thereon, the territory included within his surface boundaries is segregated from the public domain in so far as all parties except the Government are concerned. The locator is entitled to the exclusive possession and enjoyment thereof until it is forfeited or abandoned; the prospector cannot go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much a trespass as though the ground were patented. To make a valid location the prospector must discover a vein or lode or deposit upon the unoccupied and unappropriated public domain. He must then perform certain acts, among which is the sinking of his discovery shaft within the limits of the territory which he has a right to appropriate. He cannot be allowed to sink such shaft upon ground embraced within a prior valid and subsisting location.

"23. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 8, as follows:

"The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs, or their grantors, were in the quiet and undisputed possession of the premises designated in the complaint as the 'Eulalia lode,' claimed by the defendant as the 'Golden Rod lode;' that upon May 30, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign or notice containing the name, the Eulalia lode, the name John Kennedy, the locator, and the 30th day of May, 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia Lode claim by the erection of six substantial stakes, hewed or marked on the sides in toward the claim, and sunk in the ground one at each corner and one at the center of each side line, so as to be readily traced, and that on or about June 17, 1893, and within ninety days of said 30th day of May, A. D. 1893, the said plaintiffs duly recorded a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of

at least 10 feet from the lowest part of the rim of such shaft, at the surface, and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock in place, bearing gold, silver, or other precious metals, then this constitutes a *prima facie* case for the plaintiffs, which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture, and the acquisition of a better right or title by the defendant and its grantors."

None of the evidence of the plaintiffs with reference to the existence and disclosure of a vein or lode in the Pocket Liner shaft, within the limits of the Eulalia lode, prior to its location May 30, 1893, was permitted to be presented to the jury. But fortunately a witness called by the defendant disclosed in a clear and concise manner the fact that he, with his coowners of the old Pocket Liner lode, had so discovered a vein and lode some twenty feet above the 113-foot level or first level of the Pocket Liner shaft, and that such discovery was made prior to the 30th of May, 1893.

We quote the testimony of Charles Slavin upon his direct examination by defendants (page 197, Abstract):

"Q. Was there any vein or crevice—vein of mineral in that shaft that you sank down on? A. Yes, sir.

"Q. Where was that vein—where did you begin working on that vein after you got the lease from Mr. Limberg? A. Well, it was right from the first start; the vein dipped to the west and run right out.

"Q. How far did you go down on it before it run out? A. About five feet.

"Q. How large a vein was that? A. It was from six to eight inches.

"Q. In your judgment was it a vein of mineral in rock in place? A. Yes, sir.

"Q. Carrying gold and silver? A. Well, I never had an assay of it.

"Q. Did it carry iron? A. My partners told me that it did.

"Q. From your judgment as a miner was it a vein? A. Yes, sir; the only vein that I know of in the shaft."

Upon cross-examination by the plaintiffs, Mr. Slavin only reiterated his statements as above (pages 200 and 201, Abstract):

"Q. Mr. Slavin, you have testified that you discovered a vein in this shaft in 1897 at or about the first level. Is that correct? A. About twenty feet up from the first level.

"Q. What was the depth from the collar of the shaft to the first level? A. About 127 feet, along there.

"Q. And twenty feet up the shaft you discovered a vein? A. Yes, sir.

"Q. Will you describe to the jury what that vein was, what the material was on each side of the vein? A. I should judge on each side of the vein was birdseye porphyry, as far as I could see, and the vein she run southwest and northeast, and when we got down to this 127 feet she kind of dipped to the west out of the shaft, and we went straight down with the shaft. She was lying to the west and kind of went out of the shaft.

"Q. What did you pass into after going through the vein? A. Porphyry, I should call it.

"Q. How wide was this vein in places? A. From five to eight inches.

"Q. What was it made up of; what did it consist of? A. Kind of black talc and white talc.

"Q. Did you have any other similar veins higher up in the shaft than twenty feet above that level? A. No, sir.

"Q. Was this the only vein in the shaft from the top to the bottom? A. That is all I know of.

"Q. How deep did you sink the shaft from the upper level? A. Well, how deep from there down?

"Q. Yes. A. About 150 feet."

Mr. Boehmer, a witness for the defendants, corroborated the testimony of Mr. Slavin in every particular.

After the court had refused to permit Mr. Boehmer to be interrogated (page 153 of Abstract) as to the veins appearing in the lower drift crossing on their course the upper drift sixteen or seventeen feet above, for some unknown reason, the court allowed the plaintiffs to ask Mr. Boehmer as

their own witness what he saw in the upper drift, which was as follows (page 155, Abstract):

"Q. Describe the drift. A. I found a drift running northeasterly from the shaft for about twelve feet; then the drift turned more northeasterly, about north 60 degrees east, and run for a distance of twenty-eight feet. That last branch of the drift contained a vein similar to the ones down below. It runs in the direction north 61 degrees east and has a dip to the northwest of 69 degrees. It is still found at the breast of the drift.

"Q. What is the average size of that vein? A. The average size of that vein is from four to five inches.

"Q. What is its maximum width? A. About five inches, I should think.

"Q. What is its maximum width at the bottom of the face of the drift? A. It is the same, about four inches.

"Q. What does the material consist of? A. The vein material?

"Q. Yes. A. The vein material consists of soft gouge matter, clay, iron, quartz, and gold and silver.

"Q. What is the foot wall of that vein? A. The same porphyry that is found in the lower level and through this drift."

The conclusion, from the course and dip of this vein as testified to by Mr. Boehmer, and from the course and dip mentioned by Mr. Slavin, and from his evidence that he followed it some distance below this level in the shaft, can be no other than that they were and are one and the same vein.

One of the most comprehensive decisions ever rendered upon mining law is the first leading decision we will cite, upon the question of how far the previous discovery of a vein and the knowledge of the locator of the existence of a lode and vein within the limits of his location previously discovered or disclosed by himself or by some one else and abandoned and unoccupied at the time of his location, consti-

tutes a valid location and compliance with the mining statutes of the United States, is the case of

Book *et al. vs.* Justice Mining Company, 58 Federal Reporter, 106,

decided in the United States circuit court for the district of Nevada, September 18, 1893. Justice Hawley, the justice deciding the case, was and is beyond dispute one of the ablest judges and authorities upon mining law in the entire Rocky Mountain region, and enjoys in a peculiarly high degree the respect of the courts and bar alike for his great learning upon the law of mining rights.

This suit was an action in equity brought by the owners of the Peerless mining location, made by them September 22, 1892, to quiet their title against the Justice Mining Company, who claimed title to the ground under and by virtue of the mining locations known as the "West Justice" and "James G. Blaine" lodes, located the 2d day of January, 1888. These locations were upon Gold hill, Storey county, Nevada, and the ground within the limits of the claims had been located and claimed over and over again by miners and prospectors, being known as valuable mining ground for twenty years prior to the location by the Justice Company, being upon and in close proximity to the great Comstock ledge. In this respect the Eulalia location bears an analogous position to one of the immense Bonanza mines of Colorado, the number four shaft of the Little Jonny mine being but a stone's throw from the southeast Eulalia fraction.

Section twenty (20) of the syllabus of the opinion prepared by the court is as follows (page 109):

"It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location."

Upon page 128 the court, in its opinion, clearly and forcibly states the foregoing proposition as follows:

"Guided by the best lights at my command, the decisions of courts as to what constitutes a discovery, the definition of a 'vein or lode' within the meaning of the act of Congress, and the testimony contained in the record, I am of opinion that the weight of the evidence preponderates in favor of the defendant.

"It is an undisputed fact that the locators of the West Justice and Blaine locations WERE NOT THE ORIGINAL DISCOVERERS of the vein or lode, but it is *not necessary* that the locators should be the first discoverers of a lode, *in order to make a valid location.* It is sufficient if it is shown that the locators *knew at the time* of making their locations that *there had been a discovery* of a vein or lode within *the limits of the locations* made by them."

Citing Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed. Rep., 666.

We desire to call the court's attention to the close analogy of the facts of the location of the Eulalia lode with those of the facts of the West Justice and James B. Blaine locations, and for that purpose we quote the review of the testimony by Judge Hawley upon pages 121 and 122:

"Upon the part of the defendant, Lyons testified that the northwestern part of the West Justice ground had been worked by miners in 1878 and 1879; THAT HE KNEW that gold and silver bearing rock and earth had been taken out of the cuts that had been made by the miners, who at that time were working upon and claimed the same as mining ground; THAT PRIOR TO MAKING THE WEST JUSTICE LOCATION HE KNEW THAT THERE WAS A LODE WITHIN THE BOUNDARIES OF THAT LOCATION CONTAINING GOLD AND SILVER BEARING ROCK AND ORE. He described the places where the old workings were, and the open cuts which still exist upon the surface of the ground. He further testified that in 1882, when he was foreman of the Justice mine, he let a contract to four men, and that they took out from the open cuts about $800 in gold and silver ore. Other witnesses corroborate his testimony. Harrington testified that before making the Blaine location he was all over the ground and ex-

amined it closely; that he discovered and found quartz rock in place, bearing mineral, within the limits of the Blaine location; that he found holes that had been sunk seven or eight feet long and six feet deep and three or four feet in width in the ground, in which was quartz rock in place; that there were several holes sunk down below the surface in solid rock, in which streaks of quartz and porphyry were found; and that he saw in some of these holes streaks of quartz a foot wide. Other witnesses corroborated this testimony."

The latitude allowed by Judge Hawley in permitting evidence of what occurred upon the ground in 1878 and 1879, over ten years before the location of the West Justice and James G. Blaine lodes, and again in permitting testimony as to the open cuts and trenches and the $800 in gold and silver taken from them in 1882, over six years prior to the location of the West Justice and James G. Blaine locations, all of these acts and all of this work being performed by strangers to the later title, is in refreshing contrast to Judge Owers' hasty, splenetic, and unconsidered ruling in refusing and excluding evidence and testimony going to show that Samuel McMillen, one of the appellants and one of the plaintiffs below, had, in 1879 and 1880, while working with his copartners in the Pocket Liner lode, sinking that shaft, opened, discovered, and disclosed a vein of mineral bearing gold and silver some eighty or ninety feet from the surface and sunk his shaft therein to a depth of twenty-five or thirty feet further. This ruling of Judge Owers as against plaintiffs' rights was all the more unreasonable in that he allowed Charles Slavin, one of the witnesses of the defendant, to testify as to that vein in his direct examination (see pages 195, 196, and 197, Abstract), although the defendants below, appellees, nowhere and at no time in this case base their title upon this vein.

In announcing and applying the principle we are contending for in the case of Book *et al. vs.* The Justice Mining Company, Judge Hawley only followed in the footsteps of a

greater and more distinguished judge, his predecessor in the same district of Nevada upon the United States bench, Judge Sawyer, who announced the same doctrine in the case of The Jupiter Mining Company *vs.* The Bodie Consolidated Mining Company, *11 Fed. Rep., 666*, decided March 12, 1881, in the following language (page 676):

"It is not necessary that the locator should be the first discoverer of the vein, but it must be known and claimed by him in order to give validity to his location."

In the case of The Nevada Sierra Oil Co. *vs.* The Home Oil Co. *et al.*, reported in 98 Fed. Rep., 673, rendered December 18, 1899, Judge Ross, United States circuit judge for the southern district of California, again announces the same principle on page 679, as follows:

"It is also true, as a matter of law, that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location."

Citing Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed. Rep., 666, 676.

We claim for appellants that the discovery made by one of them, Samuel McMillen, in the Pocket Liner shaft, while the same was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to the Eulalia Lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim on the ground and sinking a discovery shaft over a depth of ten feet completed the other prerequisite to vest the title in him.

The statement of these preliminary and necessary incidents to acquiring mining titles to lode ground is so clearly stated by Circuit Judge Sanborn in the case of Erwin *vs.*

Perego *et al.*, 93 Fed. Rep., page 611, decided March 6, 1899, that we insert it:

"The acts of Congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession, the right to the possession and the right to acquire the title are irrevocably vested in the locator."

Citing Rev. Sts., 2319, 2320, 2324.
1 Lindl. Mines, 273, 328, 350.
Book *vs.* Mining Co., 58 Fed., 108.
Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666, 680.
Zollars *vs.* Evans, 5 Fed., 172–175.
McGinnis *vs.* Egbert, 5 Pac., 652; 8 Colo., 41.

In the same case, on pages 611 and 612, there is a discussion upon the order in which the act of discovery and location should take place, and the element of time or priority is only considered when intervening rights appear. The court says (page 611):

"There is no reason to be deduced from the acts of Congress or from the nature of the case why a claim upon which the location was made before the discovery should be held void, while one upon which the discovery was made before the location should be held valid, and the rights of these locators should be left where the Congress established them, valid and vested when both acts have been done, regardless of their order, but void and ineffectual when the rights of others have intervened before either act has been completed. The order in which the statutory requirements for securing a lode mining claim are complied with is immaterial, so long as the rights of others do not intervene before they are

complied with. The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will enure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date."

In the Perego case it seems, like Mr. McMillen, he had made a discovery of a lode inside the limits of another claim upon September 5, 1888, and Perego lost title to his point of discovery by the patenting of the "Gopher claim," a prior location. So did Mr. McMillen and his successors, owners of the Pocket Liner lode, by the approved survey of the Winter lode, United States survey 427, and their failure to adverse, lose the title gained by the discovery of the lode and vein found eighty feet down the Pocket Liner shaft. Perego went outside of the Gopher Claim lines and in 1889 located his Star lode again, and in 1890 he made a new discovery of the lode and sunk a new shaft within the limits of his claim and without the limits of the Gopher, and the court says, at page 612 of the opinion:

"It is not necessary that a locator shall make the first discovery of a vein or lode within his claim. All that the statutes require is that he shall discover the lode within his claim."

When the Eulalia lode was located by John Kennedy for the use of the appellants in this case, on May 30, 1893, both the Winter lode and the Pocket Liner lode had been forfeited for failure to do and perform the annual labor for over twelve or thirteen years, and as a matter of fact the Land Department of the Government only canceled the application for patent of the Winter lode after the protest and hearing had of John Kennedy, owner of the Eulalia lode, *vs.* W. E. Johnston *et al.*, owners of the Winter lode, by letter dated February 24, 1896 (Mineral Law Digest, Kennedy *vs.* Johnston, pp. 96, 135, 216, 227, 245, and 309).

In all these cases the courts permitted contestants to enter into the history of the ground and into the different locations made upon the ground, and in all the cases in the books we fail to find a single one that prohibits a locator from adopting and claiming a vein or lode as his discovery, whether the same was opened and disclosed by himself or others, only insisting that it was then unclaimed and unappropriated, and that the new locator knew of its discovery.

But the United States bench is not alone in announcing and upholding this theory and principle of the law.

California.

In Conway *et al. vs.* Hart, decided by the supreme court of California, August 8, 1900, reported in 62 Pac. Rep., 44, we find a case upon all fours with this one in its facts and to which the court applied the same rule of law which we seek to invoke.

Section 2 of the syllabus is:

"Evidence that, prior to the location of the claim in question, plaintiffs had sunk a shaft twenty-five or thirty feet and had taken from it a considerable amount of quartz rock, which formed a dump, and that rich rock was found, and that in surveying the claim the surveyor measured along the lode line, taking his directions for the course of the vein from a line drawn from the shaft through two or three prospect holes where the ledge was exposed, together with the admission of the contesting claimant that the rock taken out was gold-bearing, is sufficient to show that a gold-bearing lode or vein had been discovered by plaintiffs within their claim at the time the location was made."

In the opinion, page 45, Judge McFarland states the facts more at large, and the court will notice that this claim, too, had been formerly located and worked by the same parties.

"2. We think that there was sufficient evidence to warrant the court in finding that the plaintiffs had discovered a lode before their location in 1894, although the plaintiffs, who

seemed to have taken this fact for granted, could evidently have put the matter beyond a doubt by simply asking any one of their witnesses a direct question upon that subject. They, as before stated, had located this claim several years prior to 1894, and had done a good deal of work on it. They had sunk a shaft twenty-five or thirty feet deep, and had taken from it a considerable amount of quartz rock, which formed a dump. The witness, Heiser, who had worked for plaintiff, testified that some years before the last location he found rich rock on the south end of the claim and informed one of the respondents of this fact, and warned him that the claim was jumpable, and that he afterwards got rock both from the shaft and the dump to show an expert. The witness, Moise, when testifying about measuring the claim, said: 'I measured along the lode line about the middle of May. I measured from the center of the shaft in Bear creek 1,200 feet along the course of the vein so far as I could judge its course. As the ground is all capped, there is no rock in place at the surface. I took my directions for the course of the vein from a line drawn from the shaft through two or three prospect holes on the northern end of the claim, where the ledge is exposed.' And although this was after the location of 1894, still it has a bearing on the question, for the testimony is fairly susceptible of the meaning that the vein was exposed in the shaft *which plaintiffs had sunk several years before their second location.* The plaintiff, Conway, testified—indirectly, to be sure—to his knowledge of the vein at the time of the location, as appears from the following question and answer:

"'Q. What direction does the vein run upon which you posted this notice? A. North and south.'

"The defendant himself, when on the witness stand, testified as follows:

"'Some work had been done south of the shaft in Bear creek, in the direction of my tunnel, that I know of, in 1885 and 1886. It was done almost on my line in the direction of my shaft from the tunnel—between—on the vein. I was there when the work was in progress in 1886. At that time Mr. Conway and Mr. Heiser were working there. That work was inside the boundaries of my claim, probably 300 feet south of my north line. The rock was gold-bearing.'

"Now, there is no doubt whatever that there actually is, and of course at the date of the location was, a gold-bearing

lode there. The appellant so avers in his answer and proves by his testimony, and, considering all the evidence, we cannot say that the court was not warranted in holding that the rock taken by respondents and placed on the dump was not mere float rock, but rock taken from the lode which all admit to be there, *and that consequently respondents knew of the existence of the lode when their location in* 1894 *was made.* The evidence on the point was, of course, not very direct and explicit, but it was sufficient to sustain the finding."

The facts of this California case are almost identical with the facts of the Eulalia location.

The first point of resemblance is the former location of the same ground by the same parties or some of them.

The second point of resemblance is that in each case the work of discovery—that is, sinking a shaft to the lode or vein—was done years before the locations in the California case to a depth of twenty-five or thirty feet, and in the case at bar to a depth of 125 or 130 feet.

The third point of resemblance is that the undisputed fact is present in both cases of the existence of a gold and silver lode and vein in each claim at the date of location and knowledge of the existence of the lode in the minds of the locators, for in each case they were owners in the first location and were personally present when the lodes and veins were opened and discovered.

Just as in the West Justice and James G. Blaine cases in 58th Federal, the trial judge permitted evidence to go to the jury of work upon the ground in the years 1885 and 1886, and also several years prior to the location in 1894, without introducing error into the case or considering, as Judge Owers did in the case at bar, that it was immaterial what Samuel McMillen or his partner, Thomas H. Thompson, found in their 125-foot shaft when they owned the ground as the Pocket Liner Lode claim, and that the proof of a vein in the claim found by McMillen, Thompson, and his partners prior to the 30th of May, 1893, did not tend to establish any issue in the case.

And the supreme court of California had no difficulty in sustaining the prior locator's title and once again sustaining the cardinal principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain, that, other things being equal, the prior locator prevails. "*Qui prior est tempore potior est jure.*"

UTAH.

The supreme court of Utah, in Hayes *vs.* Lavagnino, 53 Pac. Rep., 1029, upon the 26th of July, 1898, stated the rule in even more unequivocal terms, as stated in paragraphs two and three of the syllabus:

"2. In a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery, *or knowledge* on the part of the locator, before the location was made, of the existence of mineral there."

"3. Under section 2320, Rev. St. U. S., the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz, or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator."

Again, the evidence is wonderfully like the evidence excluded by the court below in the case at bar, and it is significant that the appellate court reversed the case exactly for the reasons that should reverse this case, extending the rule to a discovery of mineral made by others prior to the location and by strangers to the record.

We quote from the evidence, page 1031:

"It appears the ground constituting the Gladstone claim was first located in 1878, and work done in sinking the dis-

covery shaft. Thereafter it was several times relocated, under different names, until in January, 1882, when it was located as the Gladstone claim. The parcel of ground thus located extends in a northeasterly and southwesterly direction, being bounded on the northeast by the Revere claim and on the southwest by the Montreal."

Referring to the history of the claim, counsel for the respondent, in his brief, said:

"This fraction of ground now called the 'Gladstone' was first located in 1878. The shaft now used by the appellants for a discovery shaft was then used as a discovery shaft by the then locators."

It is thus conceded that the discovery shaft was sunk before 1882, and therefore whatever mineral strata or vein may be shown to exist there must have been discovered before the location of the Gladstone; and it is but just and reasonable, under the circumstances of this case, to infer that, if a mineralized vein or lode was discovered by the sinking of that shaft, its existence was known to the locators of the Gladstone before the location was made. If a vein or lode actually exists at the point of their discovery, then such discovery would seem to be a substantial compliance with the provisions of section 2320 Rev. St. U. S., which reads:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

This clause of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If, then, in this case there was a discovery of a vein, *and knowledge on the part of the locators of metal there*, the locators were entitled to make their location, even though the original discovery was made by some one other than the locators (Jupiter Min. Co. *vs.* Bodie Cons. Min. Co., 11 Fed., 666; Erhardt *vs.* Boaro, 113 U. S., 527). Does, then, the evi-

dence show the existence of a vein or lode within the meaning of the statute? On this point the witness Gibbons, who has known that ground since 1880, testified:

"I know what was shown me as the discovery of the Gladstone. I examined with a view of determining whether or not there is a cropping of the vein there. There are indications of a vein there. There is a shaft down there and some water in the bottom of it. The surface indications on the other side of the shaft are mineralized.

"Q. Were they such indications that a miner would follow in that district, expecting to find a vein? A. Yes, sir.

"Q. Did you ever see any ore taken from there, or any rock taken from the surface? A. Yes, sir.

"Q. Is that the character of the rock, or the outcropping on the surface, where this discovery was shown to be made? A. Yes, sir.

"Q. Would that indicate a mineral vein in that locality? A. Yes, sir; it would to me."

MONTANA.

Again, in Werner *vs.* McNulty, reported 14 Pac. Rep., 643, the supreme court, July 19, 1887, sustained an instruction covering this identical proposition of law. The instruction was as follows:

"It is not necessary that the work by which the vein or lead was discovered and made visible should be made by the locators. *It is sufficient if, at the time of location, the vein or lead is exposed to view, and its existence known by the locator, for these facts would be equivalent to a discovery.*"

Both the lower court and the supreme court in the above case found no difficulty in sustaining the same rule of law, "*Qui prior est tempore potior est jure.*"

The references we have made are surely sufficient to sustain the proposition that knowledge of the existence of a vein within the limits of his location, prior to such location, is a sufficient discovery and disclosure of a vein or lode

under the statutes of the United States and the State of Colorado.

It is a remarkable coincidence that long prior to these decisions we have cited Judge Helm, in the case of Armstrong *vs.* Lower, 6 Colo., 395, made the following analogous exposition of the same principle:

"The essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral-bearing rock in place. But, if the relocator finds such vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid relocation thereon, though such finding is not a disclosure of something that 'existed before but remained unknown,' and therefore, technically perhaps, does not constitute a discovery."

To show the fine discrimination of the court in his method of trying cases, we desire to call the court's attention to the fact that instruction No. two (2), page 252 of Abstract, asked by appellants, plaintiffs below, and refused by this impartial judge, is *verbatim et literatim* the same instruction given by the same judge in the case of John Healey *et al. vs.* Albert J. Rupp, a mining adverse case tried April 1, 1898, before the same judge, which is numbered instruction No. 3, and is now before this honorable court for review as No. 4002, transferred from the court of appeals and filed in this court December 30, 1898, and appears on page 102 of the Abstract of Record. The Mr. Robert B. Estey mentioned as lessee of the Canestota lode, in whose behalf the instruction was first given by Judge Owers, is the same Robert B. Estey who appears as president of The Ferrum Mining Company (see pages 209, 210, 211, 212, 213, and 214, Abstract), the appellee, defendant below, in whose interest the said instruction was refused when presented by appellants. Consistency may be found in the "*Grave*," but not in Judge Owers' instructions.

Instruction No. three, refused and cited as assignment of error No. 18, is in the exact language of Judge Helm used in deciding the case of

Armstrong *vs.* Lower, 6 Colo., 395.

Instruction No. four, refused and cited as assignment of error No. 19, is taken almost literally from the decision in the case of

Hayes *et al. vs.* Lavagnino, 53 Pac. Rep., 1029.

Instructions Nos. 3, 4, 5, 6, 7, and 8, assignments of error Nos. 18, 19, 20, 21, 22, and 23, refused by the court as asked by appellants, were all based upon the testimony of the discovery made by Mr. McMillen in the Packet Liner shaft prior to the 30th day of May, 1893, and founded upon the excluded evidence of Thomas H. Thompson. The fact of Charles Slavin, one of defendant's witnesses, establishing the existence and disclosure of this vein only increased the obligation of the court to give these instructions to the jury, if he was at all aware of the rules of mining law and evidence established by Justices Sawyer, Hawley, and Ross, of the United States bench in the cases we have cited, or Justice McFarland, of the California supreme court; Justice Bartch, of the Utah supreme court, and Justice McConnell, of the Montana supreme court, in the cases we have cited.

Not a single authority can be found within the reports to contradict, dispute, modify, or even limit the force of the decisions we have referred to above.

The first and primary inquiry in contests over the possession and right of possession of lode mining claims is a very simple one, and that is the first in point of time to discover and to know of the existence of a vein or lode of mineral within the limits of the location.

Certainly, when the inquiry is, as it should be, confined to this narrow limit, these steps become and are very simple. All the obstacles and all the intricacies thrown or intruded into the administration and examination of concrete cases arising in the courts of the great precious mining territory of the United States arise from false conceptions and false constructions of the limitations the various States and Territories of the United States have placed, by their statutory

declarations, upon the methods to approach the short and explicit provision of section 2320, Revised Statutes of the United States, as follows:

"But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The consensus of opinion of both the Federal and State courts have modified that declaration of the national statute far enough to permit a subsequent discovery to be made validating such a location prior to discovery, where no adverse rights occur.

Two limitations and restrictions have been placed by the statutes of the States of Colorado and of Montana, which have produced technical hindrances and embarrassments in the way of judicial interpretation of the simple prerequisite of the United States statute requiring a discovery in the limits of the claim.

The Montana original territorial statute required the presence of one wall of the vein, and the State statute requires discovery shaft at least ten feet deep, showing "well-defined crevice or valuable deposit."

The Colorado statute, passed in territorial days, omits mention of the one-wall requirement of the Montana statute, but requires "a discovery shaft ten feet deep, showing a well-defined crevice."

The supreme court of Montana, Chief Justice McConnell presiding, in the case of

O'Donnell *vs.* Glenn, 8 Mont., 248, 19 Pac. Rep., 302,

gives a very lucid interpretation of the force to be given to such requirements. We quote:

"It is argued by counsel of appellant that 'to allow the selection at will of any other shaft besides the nominal discovery shaft, when a location is contested, is to leave the whole matter open to uncertainty and doubt, and cause litigation. To allow it would be to allow a fraud upon the law,

for, if a man may locate his discovery when there is no vein, he may place it at a point between two veins, when he would legitimately be entitled to but one.' The best answer to this argument is given in the Revised Statutes of the United States, wherein they provide that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced.' And further, that all 'records of mining claims * * * shall contain * * * such a description of the claim or claims located, with reference to some natural object or permanent monument as will identify the claim.'

"The fundamental mistake in the foregoing argument is that it assumes that a notice on the ground at the point of discovery is necessary when it is not required by law. All that is required is a genuine discovery of a mineral-bearing vein with at least one well-defined wall, and such a description of it in the declaratory statement of record as will identify it and enable a person to easily trace its boundaries. Can it be said that because a locator of a mine puts up a notice at a shaft which contains no mineral, when he has discovered mineral at another point in the same vein and which is covered by his location, the boundaries of which can be readily traced, and the claim identified, that he cannot hold it for that reason? Certainly not. Such a holding would be to interpolate into the statute an amendment which would lead to most absurd consequences."

Justice McConnell has stated the exact conditions surrounding the inception of the title of each of these disputing claims. The Eulalia location stake and notice and discovery shaft, not over twelve feet deep, were placed, May 30, 1893, not over 400 feet west of the east end line of the Eulalia claim.

The Golden Rod location stake and notice and discovery shaft, not over twelve feet deep, were placed, January 25,

1894, not over 400 feet west of the east end line of the Golden Rod claim.

The two shafts claimed as the discovery shafts under the statutes of Colorado for these two claims were only four feet apart. The discovery notices were placed for each claim at these shafts and at no other place or places. Neither the appellants, plaintiffs below, nor the appellee, defendant below, introduced any evidence to prove a vein in the immediate vicinity of these twelve-foot holes, or even claimed by any of their offers of evidence that a vein or lode existed in those shafts.

To narrow the broad terms of the United States statute "of the discovery of the vein or lode within the limits of the claim located" to a point in a mining claim perhaps six feet by three feet, or a total of eighteen square feet in superficial area, out of the total area of a claim 1,500 feet long by 300 feet wide of an area of 450,000 square feet, is to practically repeal the United States statutes upon the subject of discoveries. In these two claims, as located, an enforcement of the proposition that the discovery shaft named and claimed by the location certificate must disclose and discover within such shaft a well-defined crevice of rock in place, bearing gold or silver, would render the title to both of these claims absolutely void.

It is just such narrow, strained, and contracted constructions of mining statutes that have filled the courts of the mining States with protracted and indefinite litigation. The Supreme Court of the United States has time and again cleared away a vast amount of technicality sought to be thrown around these laws, as a careful perusal of the decisions of that court will show.

The language used by the court upon page 66, Abstract, in refusing to allow plaintiffs to prove the vein existing and disclosed in the Pocket Liner shaft, and known and claimed by them May 30, 1893, just as opened and disclosed by them in 1879 and 1880, as the discovery of the Pocket Liner lode

is full of the same narrow construction of the Colorado statutes.

"The COURT: I cannot agree with you. Our statute is clear as to what is required and it has become almost elementary. You must go either upon the vein and make your discovery, or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained."

In other words, a finality has been reached, the act of discovery is complete, a vein or lode has been opened in the Pocket Liner shaft, as in the Utah and California cases the vein, quartz, ore, and contact matter shows in masses upon a large dump, it is shown and known that a "known vein," under such decisions of the Supreme Court as—

Noyes *vs.* Mantle, 127 U. S., 348, and
Iron Silver M. Co. *vs.* Mike & Star G. & S. M. Co., 143 U. S., 394,

exists and is disclosed, which limits forever the granting terms of a United States patent for a placer claim upon such ground.

We quote from Noyes *vs.* Mantle, page 354:

"When can it be said that a vein or lode is 'known to exist' within the meaning of the section? In Reynolds *vs.* Iron Silver Mining Company, when first here, the court said that it might not be easy to define the words 'known to exist;' and as it was not necessary to determine whether the knowledge must be traced to the applicant for the patent, or whether it was sufficient that it was generally known, and what kind of evidence was necessary to prove this knowledge, it was better that the questions should be decided as they arise. When the case was here a second time the court said that the language of the section appeared to be sufficiently intelligible in a general sense, and yet it became difficult of interpretation when applied to the determination of right asserted to such veins or lodes, from the possession or absence of knowledge at the time application is made for a patent; and that if a general knowledge of their existence were held sufficient, the inquiry would follow as to what

would constitute such knowledge, so as to create an exception to the grant, notwithstanding the ignorance of the patentee. These suggestions indicated the difficulties of some of the questions which might arise in the application of the statute; but in the present case we think that difficulty does not exist. *Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.*"

In Iron S. M. Co. *vs.* Mike & Star G. & S. M. Co., 143 U. S., 396 and 397, the court says, along the same lines:

"Was there a known vein at the time of the application for a patent, within the meaning of section 2333? It was not then a located vein or lode, and the case was evidently tried by the plaintiff upon the theory that unless it was a located vein, it was not a known vein, but that, as we have seen, is not a correct interpretation of the statute. It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the Government. The proof abundantly establishes that within the last description the vein was a known vein."

Now, the evidence in the case at bar is sufficient for all time to prevent a placer applicant for patent ever securing a grant from the Government for the lode or vein contents of the ground inclosed within the Eulalia lines, and the discovery of this first vein in the Pocket Liner shaft is, as a matter of fact, established beyond peradventure. Let us now see if common sense applied to the judge's announce-

ment will logically reach his conclusion. He says the Colorado statute requires the party who adopts an old, well-known discovery to do one of two things, which he states as follows:

1. "You must go either upon the vein and make your discovery,"
2. "Or you must go into the shaft in which the vein has already been discovered and do some work."

The incidents and requirements of the Colorado statute of relocation is as follows, quoted from section 3162, Mills Annotated Statutes:

1. By sinking a new discovery shaft.

2. The relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment.

Mr. McMillen went upon the ground of the Winter and Pocket Liner lode claims, which each covered parts of the present Eulalia lode. The Winter discovery shaft was located upon Tract B and about 445 feet from the east end line of the Winter lode. Mr. McMillen placed his discovery shaft forty-five feet east of this old Winter discovery shaft. (See plate, Tract B, page 44, Abstract.) The Winter discovery shaft had been sunk in 1879 something over 200 feet and there were evidences of sulphide ores upon the dump, presumably from veins or crevices found in sinking the shaft. The Pocket Liner discovery shaft was 800 or 900 feet west of the Winter discovery shaft and was located upon Tract C. (See plate, page 44, Abstract, and also see plate page 60, Abstract.) This Pocket Liner shaft was of a depth of 125 feet and was the one in which McMillen was interested in 1879 and in which they had discovered a vein or lode in 1879, the said vein coming in at eighty to ninety feet from the surface and passing out to the westward at 120 to 125 feet. With his knowledge of the existence of the vein he

could do one of the two things—either sink his old Pocket Liner shaft ten feet deeper or sink a new discovery shaft ten feet upon the surface. He chose the latter method, and although he adopted the old discovery made by himself in 1879—and the vein was then already discovered, and he knew it—this wise court requires him to move the only vein and discovered lode he knew of into the narrow precincts of his ten-foot hole required by the Colorado statute to a point 800 or 900 feet away. Is it inconsistent for us to believe with Judge McConnell in the case of O'Donnell *vs.* Glenn, 8 Mont., 248, "that the notice and stake at the shaft which contains no mineral" is sufficient to hold his claim, when he has discovered mineral at another point in the same claim and which is covered by his location?

An enlarged and liberal view of the term discovery shaft, as described by our Colorado statutes and the various decisions of our own State courts and the Federal courts, leads us to the following views:

1. That primarily it intended that the discovery shaft or opening should be a point to commence the survey of the claim from, showing so many feet along the course of the vein upon each side of the shaft upon the course and showing so many feet upon each side of the shaft approximately upon the dip of the vein, and this latter to be entirely for requisite surface ground for proper working. This view and the practice of the United States Land Office practically limits the discovery shaft for purposes of survey to the middle line of the claim upon a strip of ground six or eight feet wide and 1,500 feet long.

When we consider the location of an abandoned claim like the Winter lode, absolutely surrounded by patented and located claims with positive and determined rights, Mr. McMillen was limited to this line for his discovery shaft if he wished to cover all of the ground formerly inclosed in the original Winter lode as surveyed in 1879. When we

state the fact that the Pocket Liner shaft, where the only vein Mr. McMillen had knowledge of upon May 30, 1893, was discovered, was situated only 100 feet from the south side line of the Eulalia lode, it is obvious that he could not adopt that point as his center line, though he could claim and did claim the discovery of mineral contained in that shaft as his compliance with the discovery requisites of the statute, being as it was and is within the limits of his claim.

2. The act of February 9, 1866, of the Colorado territorial statute was in the following words:

"And the discoverer or discoverers shall, before recording, excavate thereon a shaft at least ten feet deep or deeper, if necessary to find a well-defined crevice, or forfeit all right and title he or they may have acquired by virtue of such discovery."

Taken alone without other legislation, the legislative intent at that time was in substance:

That the vein or lode must be found by the claimant not less than ten feet below the surface of the earth.

The later legislation of February 13, 1874, adds the word "discovery" in the adjective or qualifying sense and limits its time for sinking the shaft so mentioned to the period before filing the location certificate.

Now, if the vein is disclosed in an opening or shaft below a depth of ten feet from the surface, necessarily the discovery of the vein and crevice parts of both statutes have been complied with, and all that remains for the locator, for we can hardly term him a discoverer of a vein disclosed and uncovered many years before, is that he shall have a point of commencement for his newly surveyed claim, and to comply with the statute he must sink a new ten-foot hole, and as, in this instance, he places it 150 feet from each side line, how can he be said to have failed to comply with both intents of the statute?

Where the narrow technical construction of the objects and purposes of the discovery shaft in mining legislation obtains, you will hear this proposition announced :

" If no discovery need be found within the discovery shaft, it follows logically that there is no need of a discovery shaft."

Plainly such an argument overlooks the equally important requisites of the mining State legislation :

1. A point at which to commence the survey along the center line of the claim and upon each side of the center, which our statute declares to be in the majority of the counties not exceeding 150 feet.

2. A point at which a notice of discovery and claim is placed, with a shaft at least ten feet deep, thus making a permanent opening in the ground to be easily known as the starting point of the survey, this point being used as a monument to tie the corner posts of the claim.

Surely these other uses and purposes of the discovery shaft, as mentioned in the statute, are equally of prime importance in estimating the objects of the requirement.

The ruling of the district court of the fifth judicial district has been uniform and continuous under all of the judges at different times presiding in Lake county :

" That if a vein or lode of gold or silver bearing ore in rock in place was discovered anywhere within the limits of the claim located, at a depth of ten feet below the surface, the provisions of the United States statutes and the Colorado statutes relating to 'discovery' were fully complied with, and in such case an actual discovery in the discovery shaft was not necessary and a prerequisite."

And this ruling has never permitted the claimant to escape compliance with the other condition of location, having a ten-foot shaft designated in the statute " discovery

shaft," from which his survey started on the course of the claim and marking its actual surveyed width and the point where the discovery notice was and is to be placed.

The statute law never contemplates the doing of a useless or foolish thing, and yet it is possible to state a multitude of conditions where such acts would be required from the narrow construction of the uses and purposes of a discovery shaft.

Let us suppose that a shaft has been sunk to a depth of 1,000 feet by parties seeking a vein upon unappropriated mineral ground of the United States; that at the bottom of such shaft a vein of mineral has been encountered; that afterwards no steps are taken to secure a United States patent, and there is a cessation of the annual labor thereon for a period of ten or twenty years, the property becomes that familiar thing known in all mining territory, "abandoned and jumpable." Upon the dump are the evidences of the mineral vein discovered under perhaps a thousand feet of porphyry, sand rock, shale, lime, webergrits, or perhaps wash. The shaft is filled with water. A prospector comes along who formerly worked in this identical shaft and knew of the discovery and disclosure of this vein at a depth of 1,000 feet. Will it be contended for a moment that he must take out of that shaft the immense volumes of water and sink that shaft ten feet deeper, or be limited to finding another vein in the limits of this claim at ten feet from the surface which he must call his discovery shaft? By no means. The discovery of a vein within the meaning of the United States statute, for all his purposes has been made so that he can adopt it as his own, and the fact that the vein has been found ten feet or more below the surface complies to a dot with the additional legislation of the State of Colorado. He has completed his discovery under the grants of the United States to its citizens as fully and completely as Columbus was entitled to his contract rights in the New World from Ferdinand and Isabella.

In the case of Fisher *vs.* Seymour, on appeal twice from the district court of Lake county and reported in

16 Colo., 188, and

23 Colo., 542,

one of the turning points of the case passed upon the question of the validity of the American Flag Lode location, the undisputed evidence in the case being that no vein or lode had been discovered in the American Flag "*discovery shaft,*" but that prior to the location of the Tiger lode a vein and lode had been discovered in the Fisher shaft within the limits and boundaries of the American Flag lode.

On page 546 of the second decision of this case, in 23 Colo. Rep., appears the diagram or map of the claims which was introduced in evidence on the trial, and an examination of this diagram in connection with the record and decision clearly demonstrates that the only discovery of mineral in place within the boundaries of the American Flag claim was made, not in the so-called American Flag *discovery shaft*, fifty or sixty feet from the south end line of the American Flag claim and 150 feet distant from each side line, as located and recorded, but was made in the Fisher shaft, marked upon the diagram with a large "cross," this shaft being 800 feet from the south end line, 50 feet from the west side line and 250 feet from the east side line of the American Flag claim as located and recorded, and within its boundaries.

The court says, page 550:

"In this shaft mineral of commercial value was found, this being the only ore at that time disclosed upon either of the claims."

At page 552 the court says:

"An examination of the transcript shows the fact to be established by competent evidence, and undisputed, that a vein of mineral was discovered upon the American Flag claim prior to the relocation of the Little Tiger lode under

the name of the Tiger, and this is sufficient to validate the American Flag location from the date of such discovery."

The discovery of the lode and vein of mineral upon the American Flag claim, about which there was no dispute, was made between the first day of January and the last day of March, 1880, just shortly before the death of Thomas Fisher, which occurred April 10, 1880, as shown by the record, and was made in what is called the Fisher shaft, and is marked on the diagram by a large cross and was sunk by Mr. Fisher to a depth of forty or fifty feet before his demise, and this Fisher shaft never was the shaft set out in the location certificate of the American Flag claim as the technical discovery shaft, that location certificate having been recorded June 24, 1879, over six months prior to the discovery as made in the Fisher shaft, the distance between the two shafts being not less than 750 feet.

This decision is entirely in line with

O'Donnell *vs.* Glenn, 8 Mont., 248; 19 Pac., 302;

Harrington *vs.* Chambers, 1 Pac., 362;

thus placing Montana, Utah, and Colorado together upon this important point of construction.

An opposite construction would bring this legislation under the just criticism as made by Senator Teller, then Secretary of the Interior, in

Wight *vs.* Tabor, 2 L. D., 741:

"It is said that the statutes of Colorado, made in pursuance of the authority given by the act of May 10, 1872, require that there shall be a discovery in the discovery shaft. The provision is as follows:

"'By sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well-defined crevice.'

"If the legislature of Colorado had authority to require such discovery in the discovery shaft it is by the provision of section 2319, Revised Statutes, May 10, 1872. It may well be doubted whether the legislature of Colorado can

attach such a condition to the appropriation of mineral lands, when the national statute only provides for the discovery of mineral within the claim. * * * It is the discovery of mineral that entitles the discoverer to a claim; it is equally meritorious whether discovered in the discovery shaft or in any other part of the surface ground of his claim, as the national statute is silent as to where it shall be found."

Admitting the apparent inconsistencies of the statute, still when one considers that the prospector and locator can exercise his option upon the two requirements of the statute we can see no objection to his having—

1. A shaft which he calls his discovery shaft, located at the center line of his claim, 150 feet distant from each of his side lines, and sunk a depth of ten feet, being called in his location certificate the discovery shaft, and the starting point for his claimed length and width of his location.

2. Another shaft, an open cut, an adit, or a tunnel, wherein, below a depth of ten feet from the surface, he may make a discovery of a vein and lode of mineral under the statute, the point of discovery being within the boundaries of his claim.

Now, a large part of the ground in the Eulalia location was embraced in the Winter lode, and if we call it a relocation Mr. McMillen had the option of entering that shaft, as well as the Pocket Liner shaft, and yet because he does adopt the other alternative of the relocation statute, he is debarred by the rulings of the trial court from claiming the discoveries of either shaft, one of which was beyond dispute made by his own efforts and expenditure.

The very fact that section 3162, Mills Ann. Statutes, speaks of another discovery shaft for the relocation of abandoned lode claims creates and impresses upon the mind the conclusion that, the discovery having been already complete, such

new shaft is for survey purposes and for notice to othe r would-be claimants.

At one stage of the introduction of plaintiffs' evidence, page 62 of the Abstract, plaintiffs offered in evidence the stock transfer book of the Legal Tender Consolidated Mining Co. to show the ownership by Mr. McMillen of an eighth interest in the Pocket Liner lode, and that he received stock of the company for that interest. The defendants objected, as follows:

"Our objection is that any question of what had been done, or who had owned this Pocket Liner shaft, or the ground that was covered by that, cannot be material."

In answer to that objection, counsel fully apprised the court of the grounds for the offer and its close and material connection with the main issue of the case:

"I want to say to your honor that, under the laws for the location and discovery of mining claims in the United States and the State of Colorado, and the mining States of the United States, the fact of a discovery of ore by a locator in a claim in which he was interested ten or twelve years before, is practical compliance with the statutes of the United States, and we will follow this up by proving an uninterrupted line of decisions by such remarkable judges as Judge Sawyer of the United States circuit court of Nevada and Judge Hawley, that knowledge either on the part of the original discoverer of ore in the shaft, or if he was not an owner in the original claim, that his knowledge is equal, at the date that he places his stake upon the ground to a discovery by the actual working upon the lode itself, and that is the object of the offer to show that Mr. McMillen owned one-eighth interest in the Pocket Liner claim; that ore was discovered in that shaft seventy-five or eighty feet in the shaft, and continued down to the first level 113 or 114 feet deep to the westward in that shaft."

Instruction number seven, refused by the court, was also based upon the evidence ruled out by the court, and states the proposition that an entry upon land held by virtue of a valid

discovery of a vein is as much a trespass as though the ground were patented, and that a subsequent claimant cannot be allowed to sink a shaft upon ground embraced within a prior valid and subsisting location.

The testimony of Mr. McMillen, page 245, Abstract, and Thomas Walsh, pages 246, 247, 248, and 249, establishes the fact that Mr. Limberg, one of the locators of the Golden Rod, had notice, before his discovery shaft was down ten feet and before he had made any effort to work in the Pocket Liner shaft or had filed a location certificate, that the ground was already located and claimed by Samuel McMillen and his co-owners, and that his entry was upon ground already occupied and claimed by other parties.

With this evidence alone it was error to refuse this instruction.

We therefore submit to the court that the trial court committed error in refusing to allow any proof of plaintiffs whatever as to the disclosure and existence of a vein of gold and silver bearing ore in rock in place in the shaft designated as the Pocket Liner shaft within the lines of the Eulalia Lode claim upon the 30th day of May, A. D. 1893, the date Mr. McMillen laid claim to the Eulalia lode by posting his notice, sinking his ten-foot hole, and recording his claim and marking its boundaries, and that Mr. McMillen was one of the owners of the Pocket Liner Lode claim in the years 1879 and 1880, and of his own means and expenditure discovered the vein then and now existing and disclosed in the Pocket Liner shaft, and that he knew of its so existing upon the 30th day of May, A. D. 1893, when he made his location.

And we respectfully submit that the refusal to give the instructions asked covering that state of facts so excluded was error.

We come now to the second, third, fourth, fifth, twenty-fourth, and thirtieth assignments of error.

During the year 1894 the appellants, plaintiffs below

drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth into the southeast fraction of their Eulalia claim, a distance of over sixty-four feet, and also constructed and opened certain upraises and stopes; that in these workings they opened and disclosed a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore. The workings may be seen as presented in the map offered in evidence by Plaintiffs' Exhibit 24. (See page 53 of the Abstract.)

Page 51 of the Abstract contains the testimony of W. L. G. Smith and the offer of the map in evidence, and the ruling of the court excluding it follows upon pages 52, 54, 55, 56, and 57:

"W. L. G. Smith—Am a mining engineer; was a mining engineer in October, November and December, 1894, and January, 1895. I was employed by Ronald Morrison about that time to survey along the lines of the Little Vinnie lode, what is known as the Eulalia lode. I have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode.

"Mr. CAVENDER: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. ELDER: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of min-

eral in either the drift, or the stopes above the drift during the period of the year 1894; that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of this claim upon the ground, and in support of that proposition I desire to call the court's attention to a case within the last year, heard in your honor's court, in which a discovery was made underground from the Price shaft, and in which I believe Mr. Estey was interested, and which discovery was made underground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, *that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.*

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing, as far as I see the evidence now. I may be mistaken. This particular part which

you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

"M. N. McInnis, witness for plaintiff, pp. 58 and 59, Abstract—Miner; have mined upon Breece hill; mined on the Little Vinnie in December, 1894; am familiar with the underground workings of the Little Vinnie, yes, sir, part of it; and familiar with what is known as the 380-foot level of the Little Vinnie.

"Q. Do you know of any work having been done from

that level towards the Eulalia Lode claim in the fall? A. We have an upraise; we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained such objection.

"The court has already decided that such a drift does not constitute a discovery.

"To which ruling of the court, plaintiffs, by their counsel, duly excepted."

The offer of the map and the evidence of M. N. McInnis of work in the drift, stopes, and upraises was made also in support of and to connect the ore shipped from a lode and vein found in the southeast fraction of the Eulalia claim from the 380-foot level. The court had previously refused to receive evidence of Smelter Settlement No. 1, page 20, Abstract; Smelter Settlement Book, page 31; Receipt, page 32; Control Assay Certificate, page 26; Weighmaster's Bill, page 25; Sampler's Bill, page 28; Check Union Smelting Co., pages 34 and 35; Deposit Book Ronald Morrison, pages 37 and 38; Daily Balance Book Leadville Savings and Deposit Bank, and these offers were to connect the ore so shipped with the work upon the vein and lode opened from the 380-foot level of the Little Vinnie lode by Ronald Morrison, one of appellants.

Condensing the rulings of the court, we have these two remarkable announcements:

1. You cannot have a secret or concealed discovery from an opening on another claim or on Government land.

2. You cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground

unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same.

We venture the assertion that no other court, either upon the *nisi prius* or appellate bench, has ever advanced such erratic views upon a case so presented.

The use of the words "secret and concealed" by the court announce a proposition that no statute of the United States or of any of the mining States have formulated into words.

The information which the law requires the owners of the Eulalia lode to give the public was complete when they placed a discovery notice and location notice upon a stake at their discovery shaft, when they marked their claim distinctly upon the ground by four corner posts and two side center stakes, all correctly marked, and when upon June 17, 1893, they recorded their location certificate in the recorder's office in Lake county, Colorado.

In the case of

Noyes *vs.* Mantle, 127 U. S., 348,

the Supreme Court of the United States has announced what these acts amount to when ground so located is attempted to be claimed by a subsequent placer locator:

"Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode."

Indeed, if we were to judge from the long and extended experience of those who are familiar with the mining camps of Colorado for forty years, we are driven to the conclusion

that almost every discovery of a new vein or lode of pronounced value, without exception, is kept as a "secret and concealed discovery" without reference to its being found in a discovery shaft, open cut, adit, tunnel, cross-cut, incline, or drift from another adjoining claim, until the discoverer's rights are put beyond jeopardy, and this is always done without violation of any statutory prohibition, for there is none, or in defiance of any decision of the courts, the learned judge of this court to the contrary notwithstanding. What basis the court had for his insinuations we are at a loss to understand, and certainly if we could under the law do annual assessment work by, through, and from the underground workings of the Little Vinnie, there is no authority for prohibiting us from proving a vein, lode, or ledge found in such work.

The second announcement is so puerile and whimsical that we beg the pardon of the court for dwelling upon it. Indeed, it is absolutely and diametrically opposed to the plain, positive, and clear terms of our State statute upon the subject. We quote section 3154, Mills Annotated Statutes, act passed February 13, 1874:

"Any open cut, cross-cut, or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered shall be equivalent to a discovery shaft."

The best definition of the word "cross-cut" is "a short tunnel; a level driven across the course of a vein."

Neither the word "cross-cut" nor the word "tunnel" is limited by a qualifying adjective connecting them by an opening to the surface. The word "cross-cut" is as frequently applied to workings deep in a mine as the surface workings.

Our supreme court has expressly and conclusively recognized the right of a discoverer of a lode made from an ad-

joining claim by and through a cross-cut, a tunnel, or a level, the opening to which is entirely off of the ground so located. The case is

Hall *vs.* Kearny, 18 Colo., 505; 33 Pac. Rep., 373.

No error was found, either by the trial court or the supreme court, in the fact that the vein discovered was found from a cross-cut, tunnel, or level not having its opening upon the surface of the John Randolph claim, so held by such discovery. We quote from Judge Hayt's opinion:

"It is also contended that plaintiffs committed a trespass in locating the John Randolph claim, and for this reason it is sought to invalidate that location. The facts upon which this is predicated are as follows: One James Hall, the owner of a claim adjoining the Nolan-Gilmer claim, had driven a prospecting tunnel for the development of his claim. Plaintiffs obtained permission from Hall to continue this tunnel for the purpose of developing the Nolan-Gilmer claim. They continued the tunnel across the Nolan-Gilmer patent without finding a lode, but, *upon extending it a few feet beyond the west side line of that location, they did discover a lode, which they located as the John Randolph.* It is claimed that their rights in the tunnel were limited by their contract with Hall, and that any discovery made in the public domain to the west of the Nolan-Gilmer claim would inure to appellant, he being Hall's grantee as to such rights. In other words, it is urged that as the Randolph location had its origin in the discovery in the tunnel, in equity it belonged to Hall. This is entirely outside any issue made by the pleadings. If in fact appellee's license only authorized them to extend the tunnel through the Nolan-Gilmer territory, *this did not prevent them from locating the lode discovered in the tunnel beyond the side lines of said claim*, although this was not contemplated by their license."

The brilliant, erratic, and novel conception of the judge of the district court of Lake county, of a "secret or concealed discovery from an opening on another claim or on Government land," seems never to have occurred to such a profound mining lawyer as Robert S. Morrison, counsel for the Moni-

tor Extension lode, claimed by his client, George W. Hail, as an objection and a ban upon the John Randolph discovery; nor did it occur to Chief Justice Hayt or Justices Elliott and Goddard, of the supreme bench, that the trial court had committed error in admitting evidence of such a discovery in a cross-cut or tunnel not having its opening upon the surface of the John Randolph claim.

The above case was an adverse mining case, and no other surface work seems to have been accomplished save and except a ten-foot shaft, a discovery stake and notice, with the usual staking and record of the claim. In fact, the annual assessments for the years 1884 and 1885 seem to have been performed by an incline driven towards the John Randolph claim from the tunnel or cross-cut in which the discovery was made.

No case can be found in the books where a discovery made from outside the limits of the claim by shaft, incline, cross-cut level, or tunnel drift from workings of or upon another claim or vacant Government land has been held invalid, save and except where no location was made upon the surface, no stakes set, no discovery notice, no monuments outlining the claim, and no discovery shaft sunk.

The fact that in the Eulalia case the staking, notice, and record was prior in time to the discovery in the cross-cut drift from the 380-foot level of the Little Vinnie claim is the sole difference between this case and the Hall *vs.* Kearny, 18 Colo., 505, case, and we submit that the compliance of the locators of the Eulalia lode with every requisite of the national and State statutes providing for staking, work, record, etc., was a sufficient notice to all the world, and especially to these jumpers, whom the evidence discloses as having actual personal notice of their claim of title.

We therefore contend that it was manifest error in the court to refuse plaintiffs their undoubted right to prove a vein, lode, and deposit of gold and silver bearing ore in rock in place, found and opened by them in their drift and stopes

from the Little Vinnie workings, and that the refusal to give instruction No. nine, page 259, Abstract, asked for by plaintiffs, and covering this state of facts, was reversible error.

Assignments of error Nos. six, seven, and thirty-two present an extraordinary proposition, which, we dare say, has never reached any appellate tribunal before.

The proposition announced by the court was simply this: That a writ of restitution and an injunction issued in aid thereof, obtained by the defendants, appellees herein, under section 159 of the Code of Colorado, had such force and effect as to prohibit appellants from peacefully entering within the Pocket Liner shaft, a shaft within the lines of their Eulalia claim, such entry taking place peaceably in the continued absence of appellee, and when neither they nor their servants were in possession of the said shaft, the whole ruling of the court having practically the force and effect of trying this ejectment and adverse case in a hearing for a writ of injunction for affirmative relief having the force and effect of a writ of restitution.

It seems that upon the 5th day of January, 1895, appellee brought an action for a writ of restitution under section 159 of the Code against plaintiffs, appellants herein, to have restored to them possession of the Pocket Liner shaft and the ground adjacent to said shaft. The writ was obtained and the appellee, defendant below, was restored to possession and went into possession. The injunction, summons, complaint, answer, and judgment and decree in that action appear in full, pages 69 to 92 of the Abstract. This action served its purpose, appellants retiring and surrendering possession of the shaft to appellee and its agents.

The code provision limits the extent and power of the court in the following manner:

Section 159, Code, line 14:

"The granting of such writ to extend only to the right of possession under the facts of the case in respect to the manner in which the possession was obtained, leaving the par-

ties to their legal rights on all other questions as though no such writ had been issued."

The question arose upon page 68 of the Abstract, where the evidence refused and the ground therefor are stated.

"J. J. Green—Have resided in Lake county a little over twenty years; yes, sir; I worked within the lines of the Eulalia Lode mining claim some time in the fall of 1895. I did that work 113 or 114 feet from the collar of the shaft.

"Q. What did that work consist of?

"Mr. CAVENDER: I wish you would ask the question who he worked for.

"Q. Who did you work for? A. Mr. Sam McMillen.

"Mr. CAVENDER: We object to any further testimony on the ground because at the time that the work was done as alleged, any other work done at that time was in disregard of an injunction issued by this court against the plaintiffs in this case, and they cannot use any work or anything done at that time which was done in disregard and contempt of court in this case. January 19, 1895, is the date of the injunction.

"The COURT: I want to ask the witness, what do you mean by 113 or 114 feet from the collar of the shaft? A. I mean in depth.

"The COURT: You mean down this very identical shaft? A. Yes, sir.

"The COURT: You went down this shaft 113 or 114 feet to do this work you were asked about? A. Yes, sir.

"The COURT: You could not take possession of that shaft in violation of the injunction. I could not allow you to show work on that shaft during the pendency of this injunction.

"The objection is sustained. To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

The operative words of the writ were as follows, pages 70 and 71, Abstract:

"do strictly command you, and each and every one of you, that until the further order of said court, you and each of you, and each of your servants, agents, attorneys, employés and all persons acting under the control, authority or direc-

tion of you, or either of you, the defendants above named, *do absolutely refrain and desist from interfering with the workings* connected with the shaft or with the gallows frame, engine-house and ground immediately surrounding said shaft, or *with the possession* of the plaintiff, its agents, servants and employés, or *from interfering in any way* with the plaintiff, its agents, servants and employés in gaining access to or egress from said shaft. * * * And we do further strictly command you * * * that you *surrender and restore* to the plaintiff, its agents, servants and employés, *possession of the shaft* and *workings thereon.*" * * *

The prayer of the complaint asked for four things, pages 79 and 80, Abstract:

1. Writ of injunction for affirmative relief having the force and effect of a writ of restitution.

2. Temporary injunction from shipping, selling, or disposing of any ore from said premises.

3. For perpetual injunction from working or mining thereon or therein.

4. Temporary injunction from interfering with the workings, shaft, etc.

The court granted the writ of restitution and temporary writ of injunction from interfering with the workings, etc., and refused to grant injunction against working or mining in the premises or shipping ore from the premises.

Our reading of section 159 is that the power of the court is confined simply to restoring the complainant under it to his possession and to enjoining the respondent from interfering with his occupation and possession while he remains there.

The facts were, the plaintiffs in that writ of possession walked away from the shaft after they had been put in pos-

session and remained away continuously, and while they were absent Mr. McMillen and his employés went to work in the shaft, being part of the Eulalia ground, and did their assessment work by running a drift upon the vein at 113 or 114 feet from the surface in the old Pocket Liner shaft. This was done some time in the fall of 1895.

There was no "interference with the *possession* of the plaintiffs in that action," nor were the plaintiffs "*interfered* with in any way in *gaining access to or egress from said shaft*," "and *possession* had been *restored to them*." The injunction was obeyed in all its strictness, and there is no doubt that when plaintiffs in that proceeding removed their tools, machinery, etc., from the shaft and passed out and away from the physical possession of the said shaft, and so continued, the writ was "*functus officii*," and the owners of the Eulalia Lode claim had a right to peacefully enter the said shaft as a part and portion of their claim in the absence of the complainant in that writ and its agents.

It is also a fact that the appellee and its agents actually did or attempted to do their so-called assessment work in the Pocket Liner shaft for the year 1895.

The same question arose upon pages 92, 93, and 94 of the Abstract, when John J. Green, a witness for plaintiffs, was asked with reference to work done by himself in the Pocket Liner shaft, in the years 1898 and 1899, the work being ostensibly assessment work upon the Eulalia lode for those years, and in the course of which over ten feet of drifting was accomplished upon the vein discovered in the Pocket Liner shaft, all of which testimony was refused by the court for the sole reason that the injunction and writ of restitution prohibited appellants, owners of the Eulalia lode, from working in said shaft.

Page 92, Abstract:

"Q. Mr. Green, did you do any work within the lines of the Eulalia claim at the close of the year 1897, and the fore part of the year 1898? A. Yes, sir; I did.

"Q. Where did you do that work, if any? A. In the year 1897?

"Q. No, 1898 and 1899; end of the year 1898 and the year 1899? A. Well, I done that work down the shaft also in that same drift.

"Objected to by defendant for the same reason as before. And the court sustained said objection.

"To which ruling of the court plaintiffs, by their counsel, duly excepted.

"Q. Mr. Green, did you do any work within the lines of the Eulalia claim in the month of November, 1899? A. Yes, sir.

"Q. Who did you do that work for? A. Well, I done that for Sam McMillen.

"Q. Where did you do that work? A. I done it down 113 or 114 feet down the shaft, same drift.

"Objected to by defendant on the same ground as before.

"The COURT: You don't object to his stating where the work was done?

"Mr. EWING: No.

"Q. How far did you do that work from the shaft? A. In 1899?

"Q. In 1899; what distance were you in from the side of the shaft?

"The COURT: Well, it is down the shaft? A. Yes.

"Objected to by defendant.

"Q. What kind of material or rock did you work in?

"Objected to by defendant; it is an attempt to initiate a title.

"And the court sustained said objection.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

"Q. What kind of material did you take out of that shaft at the period you worked there in driving that drift?

"Objected to by defendant. Objection sustained.

"Q. Did you see a vein, lode or ledge of mineral rock in place and did you work upon the vein of mineral bearing precious metals in the course of that work?

"Objected to by defendant. Objection sustained.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted.

"Q. If this work in the drift was done upon a vein, lode or ledge, in what direction did this vein, lode or ledge dip?

"Objected to by defendant. Objection sustained.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

If there was any life in the writ of injunction and writ of restitution granted by the district court of Lake county in January, 1895, the peaceful entry by appellants into the Pocket Liner shaft in the years 1898 and 1899, in the absence of appellee, was not interfering with the possession of appellee, and certainly, having restored the possession to appellee in 1895, the restitution part of the code requirement was a completed act. The fact that in each of those years the appellee did his assessment work or attempted to do said work in the same shaft shows that no possible violation of the injunction can be proved against appellants even if the force and effect of such a writ can be so falsely construed.

This section 159 was never intended to extend to restraining or prohibiting a defendant from working any part or portion of his claim, and its limitation is narrowed only to

"*Restoring any person or persons to the possession of any mining property or premises from which he or they may have been ousted by fraud, force or violence, etc.*"

After this has been accomplished and the particular shaft or other workings to which the writ applies become unoccupied by the party leaving, the writ is, as we have said, "*functus officii*," and a peaceful re-entry can be made by the other party owning and claiming title to the same ground. If the construction of this section were otherwise, all that the jumping or junior title to a mining controversy has to do is to smuggle or slip through a writ of restitution but a little broader in its terms and get a court like this one to sustain such a monstrous construction of the writ, and the senior title could do neither assessment work nor discovery work within the lines of the claim.

On page 155 will be found the testimony of Mr. Boehmer, a witness of appellee and adverse to appellants, as to the vein found by appellants when driving that drift thirty-four or thirty-five feet in their assessment work for the years 1895, 1898, and 1899:

"Q. Describe the drift. A. I found a drift running northeasterly from the shaft for about twelve feet, then the drift turned more northeasterly, about north 60 degrees east, and run for a distance of twenty-eight feet. That last branch of the drift contained a vein similar to the ones down below. It runs in the direction north 61 degrees east and has a dip to the northwest of 69 degrees. It is still found at the breast of the drift.

"Q. What is the average size of that vein? A. The average size of that vein is from four to five inches.

"Q. What is its maximum width? A. About five inches, I should think.

"Q. What is its maximum width at the bottom of the face of the drift? A. It is the same, about four inches.

"Q. What does the material consist of? A. The vein material?

"Q. Yes. A. The vein material consists of soft gouge matter, clay, iron, quartz and gold and silver."

Having ruled out the evidence of plaintiffs of the vein herein described in the shaft of the Pocket Liner lode as discovered and disclosed and known to exist May 30, 1893, then the further evidence of the vein found from the 380-foot level of the Little Vinnie lode and from which ore running one ounce in gold and five and four-tenths ounces in silver was shipped and sold to the smelters by appellants, the honorable court very consistently expands an injunction writ issued under section 159 of our Civil Code to exclude all testimony of the work done on the vein and the proof of the vein drifted on by appellants for a distance of not less than thirty-four or thirty-five feet in the several years 1895, 1898, and 1899.

This may be consistency in the general plan of the court

to give the title to this ground to the appellee, but we confidently assert that the supreme court of this State will declare such unwarranted extension of an injunction writ of restitution under section 159 of the Code as plain, reversible error.

In the case of

People *ex rel.* L'Abbe *vs.* District Court of Lake County, July 17, 1899, 58 Pac. Rep., 604,

the supreme court of Colorado has had occasion and opportunity to discuss the large and liberal views of this trial judge upon the extensive limits of the injunction writ, and the severe arraignment given the court for his arbitrary use of the injunctive process of his court in that case is not a whit less deserved in his unwarranted construction of the limits of the writ under section 159 of the Code. He has no precedent for this ruling, and we defy counsel upon the other side to produce a single precedent in any court, whether from such use in a trial court or upon review in an appellate court, to sustain the court's ruling.

His statement in L'Abbe *et al. vs.* District Court from the bench shows his capacity to establish precedents when he once throws away the sheet anchor of a judge, the recorded precedents of the courts.

We quote the announcement of the trial court and the short but stinging comment of the supreme court:

"If it be true that no direct precedent can be found, it is time that one should be created; and, as Murat declared himself to be his own ancestor, this court will be its own precedent. It is time the increased use of injunctions in certain directions should at least be so extended that relief may be afforded in cases like this." "Whether the ancestor was proud of his offspring, or the maker of this precedent is entitled to credit for its creation, is not strictly a legal question. We can only add that this remarkable declaration must speak for itself."

We commend this holding of the trial court upon the construction of the Code, section 159, to the tender mercies of

the supreme court, assured that they will find his conclusion equally barren of legal ancestry, and on a par as to legitimacy of legal precedent with the *pronunciamento* in the L'Abbe case.

We now come to assignment of error No. fifteen, which was as follows, page 280, Abstract:

"15. The court erred in refusing and declining the request and application of plaintiffs to send the jury impanelled in the case in a body to view and inspect the premises, as provided by section 188 A of the Code of Procedure, against plaintiffs' objection and exception saved."

See page 249, Abstract:

"Plaintiffs request that the jury be taken to the premises and given an opportunity to examine the shaft and drifts.

"But the court refused to grant said request and to send the jury to the premises in dispute.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

Page 17 of Abstract:

"Motion of plaintiffs that jury be allowed to view the premises in controversy denied by the court. Excepted to by plaintiffs."

Prior to July 3, 1893, there was no statute in effect making it *mandatory* upon courts of law to permit the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred.

Section 188 of the Code in a general fashion provided a mode and manner for a view of property, but used the words,

"Whenever, *in the opinion of the court*, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, *it may order* them to be conducted in a body * * * to the place," etc.

This provision of the Code was plainly directory and discretionary with the court, and had application to all forms of trials, both in the criminal and the civil branch of the law. It is sweeping and general in its terms and applies to all classes of cases.

In the case of—

Saint *et al. vs.* Guerrerio, 17 Colo., 456,

decided at April term of the supreme court, 1892, it was decided that section 188 was discretionary, as follows:

"It was not error for the court to refuse defendants' request to have the jury view the premises and ditch in dispute. The granting or refusing of such request was a matter resting in the sound discretion of the trial court (Code, section 188)."

Upon April 3, 1893, the legislature passed an act which, as stated in its title, was a special provision for the conduct of courts in the trial of all cases involving *the title to mining property or the mineral therein.*

The title was, Session Laws 1893, page 78:

"An act to provide for the inspection of the premises in dispute by the jury in all cases involving the title to mining property or the mineral therein, and to provide for the expense thereof."

We quote that part of section 1 of the said act, page 78, which made it the duty of the court, and *a mandatory duty,* to send the jury to view and inspect the premises:

"SECTION 1. *In all suits, actions and proceedings now pending, or which may hereafter be brought, in any court of this State, involving the title to, the right of possession of, or the mineral contained in any mine or mining claims, it shall be the duty of the court, at the trial of such suit, upon the application of either party interested therein, to send the jury impanelled in the case, in a body, to view and inspect the premises.*"

This act, as passed April 3, 1893, is absolutely unconnected by any words of reference or description with section 188 of the Code of Civil Procedure, and no mention is made in any way in the act of section 188 of the Code. Mr. Mills, in annotating the Code, placed the two in an apparent close connection by denominating the two sections Nos. 1 and 2 of the act of April 3, 1893, as section 188 A of the Code as annotated by him.

Section 188 is purely and simply a directory and discretionary provision of the code, and has been so declared, as before observed, by our supreme court.

The central controlling expression in section 1 of the act, after limiting the class of cases to those "involving the title to, the right of possession of, or the mineral contained in any mine or mining claim," is

"IT SHALL BE THE DUTY,"

and this becomes by its very terms a grant of a *power*, *a privilege*, and *an immunity*, which it no longer lies within the power of the court to decline or refuse. The formalities and conditions which it prescribes for its acquisition and performance are *imperative* in the sense that non-observance of any of them is fatal to the benefit sought.

Upon application once made to the court for such inspection and view, no discretion remains in the court.

Section 2 of the act has within its lines confirmatory evidence that no objection can be entertained to the view and inspection from the other party to the litigation.

After providing that the expenses "shall be paid by the parties to the suit in equal proportions," the section continues:

"*unless the demand for such investigation shall be made by one party and objected to by the other.*"

No other construction can be drawn from this clause of the act than that no objection of any kind can or will be

entertained by the court from a party to the case, and this, of course, removes also all discretion or volition of the court on its own motion.

A provision of a statute or a code or an act is said to be *mandatory* when it is the *essence* of the thing required to be done.

Where a statute declares a thing SHALL be done, the natural and proper meaning is that a peremptory mandate is enjoined.

Where authority to proceed in courts is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is *mandatory* and must be strictly conformed to, or otherwise the proceeding will be void.

81 Pa. St., 349, Norwegian Street.

In the above case Justice Woodward states the better rule in the following language, page 354:

"Perhaps Lord Mansfield's rule in Rex *vs.* Locksdale, 1 Burr, 447, is a better one, that whether a statute is mandatory or not depends on whether the thing directed to be done is of the essence of the thing required. Here, in order to confer jurisdiction on the court, the preliminary action of the town council was declared to be essential. There is another principle which is decisive in its application. In all cases in the courts where the authority to proceed is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory, and must be strictly complied with, or the proceeding will be utterly void" (Dwarris on Statutes, Potter's Note, 29, page 222).

In other words, this act of April 3, 1893, has included within the method of trial of certain mining litigation a power and a privilege to either party to the action, which is mandatory upon the court, and such as must be obeyed under penalty of vitiating the whole trial and having the proceedings of such trial declared void.

In section 385 of the Code of Colorado, providing for bill of exceptions on appeal, line 4 of said section contains an exactly parallel mandatory power or privilege granted to a party appealing. The words are:

"It shall be the duty of the judge to allow the same."

In the act of April 3, 1893, the words are:

"It shall be the duty of the court * * * to send * * *."

It will not be contended for a moment that the duty prescribed by section 385 of the Code, requiring the judge to sign the bill of exceptions, is "not mandatory."

The Supreme Court of the United States has decided in *Ex parte* Jordan, 95 U. S, 248, that such terms are mandatory, quoting:

"We think the appeal should have been allowed. The petitioners were defendants in the suit when the final decree was rendered. They were directly interested in what was then decided. The allowance of an appeal under section 692, Revised Statutes, follows of course, if prayed for by one who has a right to it. The language of the statute is '*shall be allowed*,' which means '*must be allowed*' when asked for by one who stands in such relation to the cause that he can demand it."

Out of the 444 sections of the Code of Civil Procedure of Colorado there are but four sections which have in them the words:

"*It shall be the duty of the judge of the court or of such court.*"

The first one of the four is section 92 E, which is section 6 of the amendment to the attachment act, passed March 5, 1894, and in which it is provided: "When the claim * * * shall exceed the sum of two thousand dollars, exclusive of costs, *it shall be the duty of such court* to forthwith certify such case and * * * to the district court."

No pretense can be made that any discretion is left in the county court when the papers show the case beyond its jurisdiction.

Section 188 A, as annotated by Judge Mills, is the act of April 3, 1893, now under discussion, and is the second instance.

Section 367 is the third instance, and reads as follows:

"Upon proof of the service of the notice, as provided in the last section, *it shall be the duty of the judge*, before whom the depositions are taken, to proceed to take the depositions of the witnesses named in said petition upon the facts therein set forth; and the taking of the same may be continued from time to time in the discretion of the judge."

The essence of the above requirement is the taking of the deposition immediately after the notice is complete and is therefore mandatory in every sense of the word and by all definitions of the word "mandatory," because the whole section would be void and nugatory without it.

The last of the four sections in which the term and phrase occurs is section 385, and covers the duty of the judge about signing the bill of exceptions:

"SECTION 385. In all cases in courts of record where either party shall except to any ruling, decision or opinion of the court, and shall reduce such exception or exceptions to writing, *it shall be the duty of the judge to allow the same.*"
* * *

The decision in the case of *Ex parte* Jordan, 94 U. S., 248, says such a phrase as the above means "must" and is mandatory.

In French *vs.* Edwards, 13 Wall., 506–511 (U. S. Sup. Ct.), the court says:

"But when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not

directory but mandatory. They must be followed or the act done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In Fowler *vs.* Pirkins, 77 Ill., 273, the court announces the same rule:

"'The words 'may' or 'shall,' when used in a statute, may be read interchangeably, as will best express the legislative intention. The rule adopted by this court is 'the word may means *must* or *shall*, only in cases where public interests and RIGHTS are concerned, and the public or third persons have a claim *de jure* that the power shall be exercised.' Schuyler Co. *vs.* Mercer Co., 4 Gilm., 20. And so, on the other hand, the word 'shall,' if any RIGHT to any one depends upon giving it an *imperative construction*, the presumption is the word was used in reference to such *right* or *benefit*; but where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely."

Citing Wheeler *vs.* City of Chicago, 24 Ill., 105.
See also Seiple *et al. vs.* Mayor *et al.*, 27 N. J. L., 407.

The legislative intent of the passage of the act of April 3, 1893, was to confer a right, a benefit, a power, a privilege, and an immunity upon the trial of "all cases involving the title to, the right of possession of, or the mineral contained in any mine or mining claims," to both parties to the litigation, and to construe that act as simply discretionary and directory upon the court is to leave the whole matter exactly where the terms of section 188 of the Code left the matter, and it would destroy that other material incident mentioned by Lord Mansfield in imperative and mandatory provisions, "the essence of the act itself."

If, therefore, it was the duty of the trial court to send the jury out to make the view, and the right, privilege, and benefit of appellants under that provision of the Code to have it sent out, it is difficult for us to comprehend how a disregard of that duty and a denial of that right and privi-

lege are discretionary and subject to the whim and caprice of the court and constitute no error. If they be so, it would seem that any other legal duty of the court might be disregarded and any other right of the litigant taken away by the court *ad libitum*, and so no hearing accorded whatever.

No considerations or opinions or beliefs of the court on the question of inconvenience or the effect upon the jury upon the facts of the case should be allowed to deprive appellants of this right given them in a case so made. Indeed, we apprehend that this honorable court will be quick to announce that this is a right given and granted to parties to such actions which cannot be taken away from them save and except by the hand of the legislative power of the State, which granted the right by repealing the statute.

We beg the pardon of the court for not quoting the well-known maxim, ITA LEX SCRIPTA EST, and letting the question go at that.

The profound statement of that principle by the great and eminent Judge Story cannot be too clearly or forcibly impressed upon both the bench and the bar (see Story Conflict of Laws, 17):

"Arguments drawn from impolicy or inconvenience, ought to have little weight. The only sound principle is to declare "*ita lex scripta est*," TO FOLLOW AND OBEY. Nor if a principle so just could be overlooked, could there be well found a more unsafe guide in practice, than mere policy and convenience. Men on such subjects complexionally differ from each other; the same men differ from themselves at different times. The policy of one age may ill suit the wishes or the policy of another. *The law is not to be subject to such fluctuations.*"

We ask the privilege of the court to file with this our brief eight copies of a brief prepared by Judge A. S. Blake in the court of appeals in the case of Patrick K. Connolly *vs.* Thomas B. Hughes *et al.*, which, upon pages 13 to 20, inclusive, discuss at large a similar refusal of the judge of the fifth

judicial district to send the jury to inspect the premises i
mining adverse case.

This refusal of the court bore with peculiar hardship u
appellants in this, that the appellee introduced five witne
to prove some six veins or lodes in place in a drift forty-
feet long. They were John King, Max Boehmer, S.
Mudd, John R. Curley, and Jesse F. McDonald. T
placed these lodes at points four, six, fifteen, nineteen, fo
and forty-five feet from the edge of the shaft. The ap
lants introduced four witnesses to the effect that these
pearances were clay slips, jointures, cleavages, and crack
the porphyry, with no definite course to them, and that th
was no demonstration of the fact that any one of th
was a vein. Charles Slavin, one of the lessees of appel
who ran the drift himself, swore that there was no vein or l
in that drift. The assays presented by Jesse F. McDon
to prove the presence of gold and silver in these preten
veins and lodes were not in the least higher than what
fessor Emmons, the engineer and geologist in charge of
geological survey of Leadville, found to be the average sil
and gold contents of the pyritiferous porphyries of Br
hill, his examinations discarding all material taken fr
the jointure planes of the porphyry and taking extens
precautions to eliminate the presence of all fractions of sil
or gold in the litharge used in the assays, which does
appear to have been done by Mr. Stevens.

We quote page 580, *Geology and Mining Industry*, of Le
ville:

"The average assay of the ten specimens of pyritifer
porphyry is 0.2773 ounce Ag. per ton; but one of th
might be considered abnormal, since it alone contains m
than the sum of the other nine. Rejecting this, the aver
of the other nine specimens is 0.0265 ounce Ag."

Again, page 583:

"From Table IV the average of ten specimens assayed
silver is found to be 0.2773 ounce per ton, or, rejecting

richest of these ten specimens as above the normal, the average of the remaining nine specimens is 0.0265 ounce silver per ton of pyritiferous porphyry."

On page 580 Professor Emmons calls attention to a larger concentration of mineral at the jointure planes of the rock.

"Both pyrite and galena are occasionally found, however, coating the jointing planes of the rock, in which case they are undoubtedly secondary."

We copy from Table IV, page 594:

"23—Pyr. por., shaft W. of Tribune, Breece hill, 2.533 Ag. No Au.

"24—Pyr. por., Hartford shaft, Breece hill, 0.08 Ag. Trace Au.

"25—Pyr. por., Montana shaft, Breece hill, 0.013 Ag. Trace Au.

"28—Pyr. por., So. Fork, White's gulch, 0.033 Ag.

"29—Pyr. por., Comstock tunnel, White's gulch, 0.033 Ag.

"34—Pyr. por., Rebel Warrior shaft, Bail Mt., 0.023 Ag."

The assays presented by appellees from their veins were as follows:

No. 1—Vein No. 4, no Ag.; 0.13 Au.

No. 2—Vein No. 4, 0.04 Ag.; 0.11 Au.

No. 3—Vein No. 3, trace Ag.; 0.09 Au.

No. 4—Vein No. 2, 0.5 Ag.; 0.02 Au.

No. 5—Vein No. 1, 0.5 Ag.; 0.01 Au.

Another assay introduced by them, but not proved as connected with a vein or lode, was 7 oz. Ag.; .03 oz. Au.

The latter assay and the best one presented by appellees was sworn to as coming from that drift at six feet from the shaft. It was permitted to go to the jury over the objection of appellants, with the understanding that, as stated by the court, page 135, Abstract:

"The COURT: The understanding is you are going to connect this with the lode.

"Mr. EWING: Certainly.

"The COURT: With the understanding that it is to be connected with a lode in rock in place it will be admitted.

"To which ruling of the court the plaintiffs duly excepted."

No witness was even interrogated as to a vein at a point six feet from the shaft, and, on the contrary, Boehmer, Mudd, Curley, and McDonald, the witnesses of appellee, all swore there was none there.

We are speaking of this last assay only to enlighten the court that an assay of the bare porphyry in that drift actually did run higher than their jointure plane and cleavage material.

Taking this apparent contradiction and the further glaring contradictions on the size of these cleavages, some of appellee's witnesses swearing to four inches in size when none of appellants' witnesses could find these cleavages greater than or even equal to one-half inch in thickness; the further fact that Charles Slavin, one of appellee's lessees in the work, testifying that the whole drift was nothing but porphyry and there were no vein there at all, and he was the only miner on the stand who drove through that porphyry.

We submit to the court that the refusal to send the jury to view that drift was an invasion of appellants' privilege and right under the act of April 3, 1893, and for this error alone this case should be reversed.

The next assignments of error are Nos. eleven and four teen and are as follows:

"11. The court erred in refusing to allow plaintiffs to cross-examine Charles Slavin, defendant's witness and lessee, upon the work done by him in the southeast drift of the Pocket Liner shaft and what he found in said drift, although directly interrogated by defendants as to work in that drift in their direct examination, and requiring plaintiffs to make the said Slavin their own witness and compelling plaintiffs to count the said Slavin as one of their four rebutting wit-

nesses of plaintiff as to the southeast drift, all over the exception and objection of plaintiffs.

"14. The court erred in limiting the number of witnesses of plaintiffs in rebuttal to four, over plaintiffs' exception and objection, and by refusing to permit proper cross-examination of defendant's witness, Charles Slavin, further confining and limiting plaintiffs' witnesses in rebuttal to four."

The significance of this ruling can be judged in all its beauty when we make the statement that the court permitted John King, Max Boehmer, John R. Curley, S. W. Mudd, Jesse F. McDonald, and Charles Slavin, all witnesses for appellee, to testify as to that drift and shaft, and then limited appellants to Messrs. Slavin, Goodwell, Guntherodt, and P. B. Turnbull as rebuttal witnesses, although his rule, page 17, Abstract, was as follows:

"Order of court that witnesses to any material fact be limited to four. Excepted to by plaintiffs."

The true rule for the limitation of witnesses is an agreement of counsel evidenced by an order of court, and then only after reference of the matter to both sides.

Page 243, Abstract:

"Malcom G. Alexander called as a witness for the plaintiffs in rebuttal.

"The COURT: You have already put upon the stand four witnesses to rebut the existence of any vein within what has been referred to as the east drift and marked upon the map as running southeasterly from the shaft.

"Mr. ELDER: We except to the ruling of the court confining us to the evidence of the four witnesses already sworn upon the existence of a vein in the east drift."

We now refer to the whole testimony of Charles Slavin, from page 195 to page 206.

The only limitation upon the number of witnesses in the statutes is contained in section 685, page 710, vol. 1, Mills' Ann. Sts., and this is confined alone to the question of fees.

In White *vs.* Herman, 51 Ill., 243, the supreme court of Illinois has passed upon this very point, as follows:

"It is also urged that the court erred in refusing to permit appellants to call more than four witnesses to prove the value of this property. It may be that on a mere collateral question, the court may have a discretionary power to limit the number of witnesses who may testify on that particular question. We are aware of no rule of practice, however, which authorizes a court to prevent a party from introducing more than four witnesses to prove the issue in the case. It is true the statute has provided that the costs of four witnesses only shall be taxed against the unsuccessful party, unless the court shall certify that a greater number were necessary, but this in nowise prevents a party from introducing more if he is willing to risk the liability to pay their fees for attendance. It seems to imply that he may call more if he choose to risk such liability."

We should state, in passing, that our Colorado statute, section 685, vol. 1, Mills, page 710, is identical with R. St. of Illinois, 1845, chap. 26, sec. 12.

Again, in 122 Ill., 598, the supreme court says, citing White *vs.* Herman, *supra:*

"There is no inhibition upon parties calling as many witnesses as they may desire, but every party must assume the risk of having taxed against him the fees of all such witnesses as the court may find were unnecessary."

Some of the reasoning of the court in the same opinion is clear and to the point.

"Before a single witness of appellee had been or could have been heard appellant made this motion. How the court in advance could exercise its discretionary power of determining what witnesses were or were not necessary to the maintenance of appellee's case is not apparent."

We know of no statute of Colorado and we know of no rule of law giving the court the authority or the power to arbitrarily and upon his own motion to limit the number of

witnesses which may be introduced in support of any issue, nor do the courts possess the authority to adopt such a rule.

This order, as made by the trial court, is another case where, like Murat's ancestor, it was necessary to create a spurious and illegitimate legal precedent.

We therefore submit to the court that the limiting of the number of witnesses who should testify on each side was error for which the judgment should be reversed.

The refusal of the court to permit appellants to cross-examine appellee's witness, Charles Slavin—one of their lessees and the man who ran this discovery drift—was such a palpable error that we just mention it as we pass.

Assignment of error No. ten was as follows:

"The court erred in permitting the evidence of John King and Eugene Stevens, relating to material taken from a point in the southeast level six feet (6) from the shaft at the one hundred and thirty-five (135) foot level of the Pocket Liner shaft, and the assay value thereof to go to the jury, without making proof that said material came from a vein, lode or ledge of mineral; and the error is manifest in this, that all of the other witnesses of the defendant disprove the existence of any vein at all six (6) feet from said shaft at the point indicated by witness John King."

This error was material, and assignment of error No. twenty-six, being to the giving of instruction No. four, based upon it, asked by defendant below, where the date of the assay card admitted in evidence March 10, 1894, is made the basis of their discovery.

No. 26. The court erred in giving instruction No. four to the jury, as asked by defendant, against the exception of plaintiffs, as follows:

"You are further instructed that if you find that on or about the 10th day of March, A. D. 1894, or prior thereto, the defendant or its grantors, or the lessees of its grantors, did discover a vein or lode of mineral in rock in place within the boundaries of the Golden Rod Lode mining claim,

and that the defendant or its grantors complied with the requirements of the laws as to staking said Golden Rod Lode claim, and recorded a location certificate within the time required by law, then you will find for the defendant."

The evidence of John King is upon pages 127 to 134, Abstract. At no place in his direct or cross-examination does he state that the material he took from the drift and had assayed March 10, 1894, came from a vein or lode. Page 129 he states, on direct examination:

"Eugene Stevens gave me this card, marked Exhibit 'C.' Yes, sir; this is the card given to me as the assay of the material taken from this drift, because I went and seen his books. That was taken about six feet from the shaft. Yes, sir; about six feet from the shaft."

On cross-examination, page 132:

"Q. What was the character of the material? A. A bunch of mineralized stuff, iron and porphyry.

"Q. What was it, kind of red porphyry? A. Kind of red porphyry mixed with oxide of iron."

Page 135, Abstract:

"Exhibit 'C' offered in evidence. Plaintiffs object to the introduction of Exhibit 'C' of defendant, bearing date March 10, 1894, purporting to be an assay card.

"1. For the reason that it is not established that the material came from the lode, ledge or vein of mineral in rock in place in the discovery shaft of the Golden Rod Lode mining claim.

"2. Plaintiff objects to Exhibit 'C' for the reason that it is not shown that the material of which this is supposed to be an assay came from a lode, ledge or vein of mineral of rock in place in the limits of the Golden Rod Lode mining claim.

"3. For all the objections made to the original lease and the record of location.

"The COURT: *The understanding is you are going to connect this with the lode.*

"Mr. EWING: Certainly.

"The COURT: *With the understanding that it is to be connected with a lode in rock in place it will be admitted.*

"To which ruling of the court the plaintiffs duly excepted."

Page 136, Abstract:

"Copy.

"DEFENDANTS' EXHIBIT 'C.'

"Office of Eugene Stevens, assayer and chemist, 110 East Fourth St.

"LEADVILLE, COLO., *March* 10, 1894.

"This certifies that the sample of ore, said to be from the —— lode, assayed for Mr. King, gave the following result per ton:

"Silver, ounces, 7; gold, ounces, .03.

"EUGENE STEVENS, *Assayer.*

"Whipple, printer."

On page 136, the photograph of map made by Max Boehmer, are displayed all the veins Mr. Boehmer could find. On page 137 he says he found a vein four feet from the shaft about two or three inches thick. John R. Curley, page 160, states that vein was "a short distance from the shaft, perhaps two or three feet," "probably an inch and a half to two inches and a half wide."

S. W. Mudd, page 169:

"About four feet from the shaft there was a vein crossing the drift at right angles and dipping to the southwest."

Page 175:

"Q. Mr. Mudd, what is the size of vein number one? A. From an inch to an inch and a half, possibly a little larger."

Page 169:

"In addition to those there was a small one running across some distance back perhaps some fifteen or sixteen feet from

the shaft, much smaller than the others, but much the same character, however.

"Q. How large? A. The maximum would be, I should think, from a quarter to half an inch in width."

J. F. McDonald, page 182:

"At a point four feet from the side of the shaft is a vein cutting across at nearly right angles, from one to two inches thick."

There was no testimony as to what existed at any point from a point four feet from the shaft to a point fifteen or sixteen feet from the shaft. Now, skilled experts like Mr. Mudd and Mr. Boehmer, who can find veins as small as from one-fourth of an inch to one-half of an inch in size, in blank porphyry, are not going to miss a vein at six feet from the shaft which seemed to assay fourteen or fifteen up to thirty and forty times what they could find in the immense veins they testified to.

To cut it short, the admission of that assay card was material error, and undoubtedly influenced the jury, and the instruction based on the date of the card—No. 4, March 10, 1894—should not have been given to the jury. This evidence ought to have acted as a boomerang to the defendant's case. If it proves anything, it proves that the red porphyry in that drift has more gold and silver contents than the small cleavages, jointure planes and slips and seams in the porphyry which the defendant's experts searched and researched, assayed and reassayed, sampled and resampled, and then could get but a trifle better returns than Professor Emmons secured from the raw pyritiferous porphyries, and in his report he takes pains to state that his samples did not come from the jointure planes and cleavage planes of the porphyries. If the court will study the cross-examination of Messrs. Boehmer and Mudd, they will discover that the drift is cracked and broken from end to end,

with slips and cleavage planes, and that when boiled down it is only a blind porphyry drift from end to end.

The conduct of the court in refusing plaintiffs to base their discovery and location upon what defendant's witness Charles Slavin denominated the only vein in the Pocket Liner shaft—and he knew because he sunk the shaft and ran the drift and was hunting at both periods, in 1879 and 1880 and in 1894, for that very thing, a vein, lode, and ledge of mineral in place; the only vein Samuel McMillen knew to be in the ground opened and exposed upon May 30,1893—cannot be explained.

His refusal to allow the proof of a vein in the southeast fraction of the Eulalia lode, where tons and tons of gold and silver bearing mineral of commercial value were taken from the vein between the porphyry and the quartz at the 380-foot level of the Little Vinnie workings, where appellants expended over two thousand ($2,000) dollars in proving a lode and vein in the limits of the Eulalia location, is equally inexplicable.

His insistence that his power to issue writs of restitution could once and forever segregate a part of the Eulalia claim from entry by its owners, no matter how peaceful, and that these owners could not be allowed to drive a drift on their vein, or even do assessment therein, and still insisting that appellants could prove no vein so encountered in the years 1895, 1898, and 1899, are all but further evidence of a powerful bias for the side of appellee in this case.

And, finally, to take away all of appellants' rights by instructing the jury that appellants had made no case, and then refusing the prayer of appellants to have the jury examine the east drift from the Pocket Liner shaft, shows such utter contempt for the orderly practice of the law that no man's property rights are safe in this court.

We have before stated that the courts and the juries of this western country have been quick to establish and confirm that old, staid maxim of the law, "*Qui prior est tempore,*

potior est jure," and we can assure this court when they reverse this case, as they must do when they contemplate the multitudinous errors committed by the court, that the next trial will vindicate the rights of the prior locator as against these jumpers.

Therefore, for the exclusion of proper evidence, for the admission of improper evidence, for the violations of the plain rules and provisions of the Code, for the refusal of proper and competent instructions and the giving of instructions not sustained by the evidence, and because the grantors of appellee were trespassers upon the ground already occupied by appellants and had full and complete notice of appellants' claim of title when they made their entry, we submit that this judgment should be reversed and the case remanded.

Respectfully submitted,

GEORGE R. ELDER,
Attorney for Appellants.